Supreme Court, U.S.
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No. 04-____

IN THE
Supreme Court of the United States

GARY KENT JONES,
Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
COMMISSIONER OF STATE LANDS,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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May 2005

QUESTION PRESENTED

When mailed notice of a tax sale or property forfeiture is returned undelivered, does due process require the government to make any additional effort to locate the owner before taking the property?

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PETITION FOR A WRIT OF CERTIORARI

In the decision below, the Arkansas Supreme Court held that, when notice of a tax sale is returned undelivered, due process does not require the government to make any additional efforts to locate the owner before selling his property. The court acknowledged that other courts have held that due process requires further efforts when notice is returned, but reaffirmed its own contrary precedent. The Arkansas Supreme Court's decision deepens an already intractable conflict among the state and federal courts and also is in conflict with this Court's precedents. The question presented, which arises often in the context of tax sales and property forfeitures, is of national importance. Petitioner Gary Kent Jones petitions this Court to review the judgment below, resolve the conflict among the courts, and provide much-needed certainty to property owners, tax collectors, law enforcement agencies, and courts across the country.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Pet. App. 1a) will be published at ___ S.W.3d ___, and is available at 2004 WL 2609800 (Ark. 2004). The trial court's decision granting respondents' motions for summary judgment and denying petitioner's motion for summary judgment (Pet. App. 12a) is unpublished. The order of the Arkansas Supreme Court denying rehearing (Pet. App. 14a) is unpublished.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on November 18, 2004. Petitioner timely sought rehearing, which was denied on January 6, 2005. On March 23, 2005, Justice Thomas extended the time to file this petition to May 6, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT

Petitioner Gary Kent Jones lost his house in a tax forfeiture sale because he did not receive notice until it was too late to redeem the property. The State sent two notices to Mr. Jones by certified mail, but both were returned unclaimed. Although the State knew that its attempts to provide notice had been ineffective, and although Mr. Jones's correct mailing address was readily available from a variety of sources, the State made no effort to locate Mr. Jones before selling his house. Once Mr. Jones learned that his house had been sold, he brought this action against the purchaser and the State, seeking to have the sale set aside because the State had failed to take reasonable steps to notify him of the tax sale and his right to redeem. The trial court granted summary judgment for the purchaser and the State, holding that the State had complied with the applicable statute and that no further action was required to comply with constitutional due process. The Arkansas Supreme Court affirmed, but recognized that a majority of other courts have held that due process requires the government to make further efforts to locate a property owner when a mailed notice is returned.

A. Factual Background

In 1967, Mr. Jones purchased a house located at 717 North Bryan Street in Little Rock, Arkansas, where he lived with his wife until they separated in 1993. Pet. App. 2a. Mr. Jones moved out of the house and into an apartment; Mrs. Jones

continued to live in the house. *Id.* After the mortgage was paid off in 1997, the property taxes went unpaid. *Id.* Mr. Jones did not notify the property tax collector of his new mailing address, *id.*, but it was readily ascertainable from multiple sources, including the Little Rock phone book, the Pulaski County roll of registered voters, and the State income tax rolls. ADD at 48-49.[1]

The State certified Mr. Jones's property as delinquent for non-payment of taxes for 1997 and later years. Pet. App. 2a. During April 2000, the State mailed a certified letter to Mr. Jones in an attempt to notify him of the delinquency and his right to redeem. *Id.* The notice stated that the property would be subject to a public sale on April 17, 2002. *Id.* Because the notice was sent to the Bryan Street address instead of his apartment, Mr. Jones did not receive it. Rather, the notice was returned to the State marked "unclaimed." *Id.* On April 1, 2002, a notice of the public sale was published in a newspaper. *Id.*

No bids were made for Mr. Jones's house at the public sale. However, on February 5, 2003, respondent Linda K. Flowers submitted a purchase offer to the State. *Id.* On February 19, 2003, the State sent another certified letter to Mr. Jones at the Bryan Street address in an attempt to notify Mr. Jones that his house would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid. *Id.* Like the first letter sent by the State to Mr. Jones at the Bryan Street address, the second letter went unclaimed and was returned to the State. *Id.*

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[1] "ADD" refers to the record excerpts included in the addendum filed with Mr. Jones's appellate brief.

Although the State knew that Mr. Jones had not received the two notices it sent by mail, the State made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale, even though Mr. Jones's proper address could have been discovered with minimal effort. Moreover, State personnel apparently visited the Bryan Street property and viewed the house as part of the negotiated sale process, but the State did not post a notice at the house. *See* SUPP ADD at 11, 26.[2]

On May 28, 2003, Ms. Flowers purchased the home for $21,042.15 through a negotiated sale. Pet. App. 2a. Even thereafter, Mr. Jones had a 30-day period in which he could have redeemed his property had he known that it had been sold. Ark. Code Ann. § 26-37-202(e). On July 2, 2003, shortly after the 30-day post-sale redemption period had passed, an unlawful detainer notice was posted on the door of Mr. Jones's property. The occupants of the house discovered the unlawful detainer notice and contacted Mr. Jones, providing him his first actual notice of the sale of his home. Pet. App. 2a-3a, ADD at 01, 11.

B. Procedural Background

Mr. Jones filed a complaint on July 28, 2003, alleging that the sale of his home was invalid because he did not receive constitutionally adequate notice of the tax sale or his right to redeem. Pet. App. 2a. Mr. Jones alleged that the State's failure to take reasonable steps to provide actual notice resulted in the taking of his property without due process. *Id.* at 3a. Ms. Flowers filed a counterclaim for unlawful detainer, and she moved for summary judgment, arguing that the two unclaimed letters sent by the State provided constitutionally sufficient

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[2]"SUPP ADD" refers to the record excerpts included in the supplemental addendum filed with respondents' appellate brief.

notice to Mr. Jones.[3] *Id.* The State filed a similar motion for summary judgment, and Mr. Jones filed a cross motion for summary judgment. *Id.*

On January 14, 2004, the trial court granted summary judgment for Ms. Flowers and the State, denied Mr. Jones's motion for summary judgment, and granted Ms. Flowers's counterclaim for unlawful detainer. *Id.* The trial court found that the Arkansas tax sale statute complied with constitutional requirements of due process and that Ms. Flowers was entitled to immediate possession of the property. *Id.*

Mr. Jones appealed the trial court's ruling and the case was certified to the Arkansas Supreme Court from the Arkansas Court of Appeals. Pet. App. 1a. On November 18, 2004, the Arkansas Supreme Court affirmed the trial court's decision. *Id.* The Arkansas Supreme Court held that the State had complied with the statutory scheme for tax sales, and that due process does not require the State to make any effort to discover a property owner's correct address even where the State knows that its notice has not been received.[4] *Id.* at 5a-6a.

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[3]After Ms. Flowers filed her counterclaim, Mr. Jones filed an amended complaint adding his wife as a plaintiff because she was the person living in the home at the time. Pet. App. 3a.

[4]The statute at issue, Ark. Code Ann. § 26-37-301, was amended effective January 1, 2004, to require actual notice to the owner of a homestead, absent proof that the notice sent by certified mail was received. As the court below recognized, the amendment has no effect on this case, Pet. App. 9a-10a. Moreover, the amendment does not diminish the mature conflict among the courts on the question presented. Even

(continued...)

REASONS FOR GRANTING THE PETITION

I. The Decision Below Deepens An Entrenched Conflict On A Recurring Question Of National Importance.

A. The State And Federal Courts Are Split.

The question presented is whether, when notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to make any additional efforts to locate the owner before taking the property. In the context of both tax sales and forfeitures, there is a deep and intractable conflict on this question among the state and federal courts. *See generally* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 792 (2000) (noting a "wide variance" among the courts "in interpreting the scope of the government's duty when notice is mailed to the last known address available from the public records and is returned as undeliverable").

In the context of tax sales, "[t]he majority of jurisdictions that have addressed this issue . . . have held that the government must undertake additional efforts when the mailed notice is returned." *Id.* at 793. Most recently, the Fourth Circuit surveyed the conflicting decisions and held, based on a thorough analysis of this Court's precedents, that "when prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient." *Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005). The Second Circuit

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[4](...continued)
within Arkansas, the question persists in cases involving all property other than homesteads.

has reached a similar conclusion. *See Akey v. Clinton County*, 375 F.3d 231, 236 (2d Cir. 2004) ("Akey's claim raises the question of what due process obligations the County incurred when her notice of foreclosure was returned as undeliverable. In light of the notice's return, the County was required to use 'reasonably diligent efforts' to ascertain Akey's correct address."). The courts of last resort in numerous jurisdictions, including the District of Columbia, Georgia, Idaho, Maryland, New York, Oklahoma, and Pennsylvania, agree that the federal Constitution requires further reasonable efforts when a notice is returned.[5] Intermediate appellate courts in many other states, including Louisiana, Massachusetts, New Mexico, Ohio, and California, are in accord.[6]

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[5]*See, e.g., Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 85 (Ga. 2003) ("[W]e adopt and apply the majority rule requiring the tax sale purchaser, before resorting to publication, to make reasonably diligent efforts beyond the use of tax and real estate records in order to ascertain the address of the delinquent taxpayer."); *Kennedy v. Mossafa*, 789 N.E.2d 607 (N.Y. 2003) ("[W]hen the notice is returned as undeliverable, the tax district should conduct a reasonable search of the public record."); *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action."); *St. George Antiochian Orthodox Christian Church v. Aggarwal*, 604 A.2d 484 (Md. 1992); *Wells Fargo Credit Corp. v. Ziegler*, 780 P.2d 703 (Okla. 1989); *Rosenberg v. Smidt*, 727 P.2d 778, 781-83 (Alaska 1986); *Giacobbi v. Hall*, 707 P.2d 404, 408 (Idaho1985).

[6]*See, e.g., Vinscon, Inc. v. Ingram*, 835 So.2d 813, 815 (La.

(continued...)

The decision below is squarely in conflict with these decisions. The Arkansas Supreme Court acknowledged Mr. Jones's argument that, upon return of a tax sale notice, "a majority of courts have held that in order to comply with due process there must be some action taken to locate a property owner's correct address," but reaffirmed its prior precedent rejecting the majority approach. Pet. App. 10a (citing *Tsann Kuen Enters. Co. v. Campbell*, 129 S.W.3d 822 (Ark. 2003)).

Although in the minority, Arkansas is not alone in its approach. The courts of several other states, including Michigan, South Dakota, Indiana, New Jersey, and Florida, have held that the return of an undelivered notice triggers no duty to undertake additional efforts to locate a property owner.[7]

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[6](...continued)
Ct. App. 2002) (when "notice is returned to the tax collector undelivered or unclaimed, the tax collector is required to take additional steps to notify the tax debtor, and the failure of the tax collector to perform this obligation renders the tax sale null and void"); *City of Boston v. James*, 530 N.E.2d 1254 (Mass. App. Ct. 1988); *Patrick v. Rice*, 814 P.2d 463 (N.M. App. 1991); *O'Brien v. Port Lawrence Title & Trust*, 688 N.E.2d 1136 (Ohio Ct. Common Pleas 1997); *Bank of America v. Giant Inland Empire R.V. Ctr., Inc.*, 93 Cal. Rptr. 2d 626, 635 (Cal. Ct. App. 2000).

[7]*See, e.g., Smith v. Cliffs on the Bay Condominium Assoc.*, 463 Mich. 420 (2000) ("The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located."); *Dahn v. Trownsell*, 576 N.W.2d 535 (S.D. 1998); *Elizondo v. Read*, 588
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Courts in other jurisdictions, including Colorado and New Hampshire, have held that a diligent inquiry in such circumstances is limited to making sure that no other addresses are available from tax or deed records, but that no further duties are imposed by due process.[8]

In addition to the tax sale context, the question presented in this case frequently arises in forfeiture cases in which courts must decide whether due process requires the federal government, upon return of mailed notice of forfeiture,

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[7](...continued)
N.E.2d 501, 504 (Ind.1992); *Clark v. Jones*, 519 N.E.2d 158, 160 (Ind. Ct. App. 1988) ("Even if the auditor knew that mail was being returned from [the last known address where the tax deed sale and notice were sent], the notice statutes and constitutional due process requirements do not impose . . . a duty to search for an alternative address."); *Atlantic City v. Block C-11, Lot 11*, 376 A.2d 926, 928 (N.J. 1977) (rejecting argument that "would place on a municipality the affirmative duty of ascertaining whether the name and address listed on its tax roles are correct"); *Hutchinson Island Realty, Inc. v. Babcock Ventures, Inc.*, 867 So.2d 528 (Fla. Dist. Ct. App. 2004).

[8]*See, e.g, Schmidt v. Langel*, 874 P.2d 447 (Colo. Ct. App. 1994) ("[W]hen, as here, notice by mail has been sent but returned as undeliverable, if a diligent search of the county records would uncover no alternative address, neither constitutional due process concerns nor statutory requirements compel the county treasurer to follow up on information which she has no reason to believe would result in the discovery of a correct address."); *Kakris v. Montbleau*, 575 A.2d 1293, 1299 (N.H. 1990).

to take further steps to locate an interest-holder. As the Seventh Circuit has noted, the "circuits have answered this question in various ways." *Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000). As with the tax sale context, the majority of courts, including the Second, Third, Fifth, Ninth, Tenth, and District of Columbia Circuits, have held that additional reasonably diligent efforts are required before the government may resort to publication or proceed with the forfeiture.[9]

Three circuits – the First, Eighth, and Seventh – have rejected the majority rule. The First Circuit has held that, absent unusual circumstances, no additional efforts are required to contact a potential claimant once a notice has been returned undelivered. *Sarit v. Drug Enforcement Admin.*, 987 F.2d 10, 14-15 (1st Cir. 1993). Similarly, the Eighth Circuit has held that, when a notice sent to a claimant's last known address is returned undelivered, further efforts to locate the claimant are not required unless the government receives notice of the claimant's new address. *Madewell v. Downs*, 68 F.3d 1030, 1047 (8th Cir. 1995); *but see Foehl*, 238 F.3d at 479

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[9]*See, e.g., United States v. Ritchie*, 342 F.3d 903, 911 (9th Cir. 2003) ("We now join [the majority of] circuits in holding that, when initial personal notice letters are returned undelivered, the government must make reasonable additional efforts to provide personal notice."); *Foehl v. United States*, 238 F.3d 474 (3d Cir. 2001); *Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1161 (2d Cir. 1994); *Barrera-Montenegro v. United States*, 74 F.3d 657 (5th Cir. 1996); *Armendariz-Mata v. Drug Enforcement Admin.*, 82 F.3d 679, 683 (5th Cir. 1996); *United States v. Rodgers*, 108 F.3d 1247, 1252-53 (10th Cir. 1997); *Aero-Medical, Inc. v. United States*, 23 F.3d 328, 331 (10th Cir. 1994).

(questioning *Madewell*'s analysis). Finally, the Seventh Circuit, although rejecting "a per se rule which only examines notice at the time it was sent and turns a blind eye to subsequent events," has "decline[d] to impose an affirmative duty upon the government to seek out claimants in each case where its initial notice is returned undelivered." *Garcia*, 235 F.3d at 291.

B. The Question Presented Is Of Exceptional Importance And Requires This Court's Intervention.

Given the nationwide importance of the question presented, the conflict among the courts is intolerable. In the tax sale context alone, the practical consequences of the conflict are enormous. Because property taxes are the primary source of revenues controlled by county and municipal governments, "[t]he lack of clarity about the constitutional requirements applicable to property tax foreclosure procedures profoundly affects the social and financial stability of a local government." Alexander, *supra*, at 751.

Without this Court's intervention, the legal actors involved in tax foreclosure proceedings – state and federal courts, officials and private contractors who administer the proceedings, purchasers of delinquent property charged with notice under state law, and property owners – are all faced with significant confusion about what due process requires when a mailed notice is returned. "The lack of common interpretation leaves the procedures in a large number of jurisdictions subject to constitutional challenge. It also leads to dramatic inefficiencies in the collection of taxes [and] inconsistent rules and standards, and impairs the ability of local governments and property owners alike to anticipate enforcement of the obligation to pay property taxes." *Id.* at 750.

The harm to individuals and businesses caused by the confusion among the courts is at least as great as it is to local governments. This is particularly so where, as here, the sale or forfeiture concerns someone's home. As the Court has explained, cases in which the government seeks to sell a person's residence illustrate an essential principle: "Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). If the conflict among the courts is allowed to stand, property owners in one state or federal circuit may lose their homes where identically situated citizens in another state or circuit would not. This unacceptable state of affairs is compounded by the possibility that federal and state courts would reach differing conclusions about what due process requires in the *same state*. *Compare, e.g., Foehl*, 238 F.3d at 479 (Third Circuit decision holding due process requires additional efforts upon return of notice sent to last known address), *with Atlantic City*, 376 A.2d at 928 (New Jersey decision refusing to "place on a municipality the affirmative duty of ascertaining whether the name and address listed on its tax roles are correct"); *compare Rodgers*, 108 F.3d at 1249 (Tenth Circuit decision holding that government "must take reasonable steps to locate a civil claimant when its initial mailings are returned unclaimed"), *with Schmidt*, 874 P.2d at 452 (Colorado decision holding that, where "notice by mail has been sent but returned as undeliverable," search of county records alone is sufficient).

Although this Court's decision in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983), made clear that in the tax sale context the government must make "reasonably diligent efforts to provide notice,"'"[i]n the years since

Mennonite, state and local governments have struggled to develop constitutionally adequate procedures for the enforcement of property tax collections." Alexander, *supra*, at 769. Deferring review at this time will lead to further chaos and uncertainty.

II. The Decision Below Conflicts With This Court's Precedents And Is Wrong On The Merits.

Certiorari is also warranted because the decision below is wrong. It held that regardless of how easily the State might discover information that would allow it to provide effective notice after an initial notice is returned, due process requires no additional efforts. That holding is contrary to this Court's precedent requiring notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As this Court explained, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

Under the *Mullane* standard, "impracticable and extended searches are not required in the name of due process," but "within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." *Id.* at 317-18. In this case, the State could easily have located Mr. Jones's correct mailing address by reference to the local telephone directory, voter registration records, or state income tax rolls. Under *Mullane* and its progeny, the State was required to take reasonable steps to ascertain Mr. Jones's correct mailing address, but the State took no steps at all. *See Mennonite*, 462 U.S. at 800 (if a party's name and address are "reasonably

ascertainable" notice by mail or equally effective means is required).

The State had a heightened obligation to take reasonable steps to ascertain Mr. Jones's current address under the circumstances of this case, because once the notice mailed to the Bryan Street address was returned, the State knew that its initial attempt to notify Mr. Jones had been ineffective. In *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972), the Court held that the State had failed to provide notice "reasonably calculated" to apprise the interested party of the pendency of forfeiture proceedings where "the State knew that the [interested party] was not at the address to which the notice was mailed." Similarly, in *Covey v. Town of Summers*, the Court held that compliance with a statute, including notice by mail, was inadequate under the circumstances because the town officials knew that the interested party was incompetent. 351 U.S. 141, 144-47 (1956) (citing *Mullane*). As discussed in section I.A. above, many of the lower courts that have considered what due process requires following the return of mailed notice have held that the *Mullane* standard compels at least some further effort to determine the correct address. *See, e.g., Plemons*, 396 F.3d at 575-76, and cases cited therein.

In concluding that due process requires no further effort to locate the correct address of an interested party when the initial notice is returned, the court below relied heavily on Mr. Jones's failure to furnish his new mailing address to the tax collector. Pet App. at 10a ("[T]he Joneses argue that the Commissioner should be required to search the public records or the phone book in order to ascertain the property owner's correct address. Again, this argument ignores the fact that section 26-35-705 [of the Arkansas Code] requires the property owner to notify the tax collector of his correct address."). This aspect of the decision below also conflicts with this Court's

precedent because "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide notice. *Mennonite*, 462 U.S. at 799. That some courts, including the Arkansas Supreme Court here, have failed to adhere to this principle provides a further reason to grant certiorari. *Compare, e.g., Elizondo*, 588 N.E.2d at 504 (relying on the dissent in *Mennonite* and characterizing "the interest-holder's ability to take reasonable steps to protect his interest as a crucial aspect of the balancing test"), *with Schmidt*, 874 P.2d at 452 ("Whether defendant might have taken steps to safeguard her interest is irrelevant to whether adequate notice was given under the circumstances.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2005

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[10]Counsel acknowledges the work of Deepak Gupta, a graduate of Georgetown University Law Center, who took a lead role in preparing this petition.

SUPREME COURT OF ARKANSAS

No. 04-449

GARY KENT JONES and JEAN L. JONES,

APPELLANTS;

VS.

LINDA K. FLOWERS and MARK WILCOX, COMMISSIONER,

APPELLEES;

Opinion Delivered NOVEMBER 18, 2004

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION; NO. CIV2003-8565; HON. TIMOTHY DAVIS FOX, JUDGE;
AFFIRMED

DONALD L. CORBIN, Associate Justice

Appellants Gary Kent Jones and Jean L. Jones appeal the order of the Pulaski County Circuit Court granting summary judgment to Appellees Linda K. Flowers and Mark Wilcox, as Commissioner of State Lands ("Commissioner"). The Joneses raise the following arguments on appeal: (1) the trial court erred in ruling that Ark. Code Ann. § 26-37-202(e) (Repl. 1997) is constitutional; and, (2) the trial court erred in ruling that the State was not required to locate Mr. Jones's correct address. As this case implicates a constitutional challenge to a statute, it was certified to us from the Arkansas Court of Appeals. Our

jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We find no error and affirm.

In 1967, Mr. Jones purchased real property located at 717 North Bryan Street in Little Rock, Arkansas. He lived there with his wife until 1993, at which time he moved out of the home and into an apartment. After moving, Mr. Jones failed to notify the tax collector of his new address. Mrs. Jones continued to live in the home after her husband moved out. Mr. Jones failed to pay his real property taxes for the years 1997, 1998, 1999, and 2000. Mr. Jones's real property was subsequently certified to the Commissioner as delinquent on February 24, 2000. The Commissioner then sent notice, via certified mail, to Mr. Jones of the delinquency and his right to redeem. The notice also stated that the real property would be subject to a public sale on April 17, 2002. This notification was returned to the Commissioner as "unclaimed." On April 1, 2002, a notice of the public sale was published in the Arkansas Democrat Gazette.

No bids were made on the real property at the public sale, but on February 5, 2003, Ms. Flowers submitted an offer to purchase the real property. On February 19, 2003, the State sent, via certified mail, a notice of the proposed tax sale to Mr. Jones at the Bryan Street address. According to the notice, the real property would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid. This notice was also returned to the State as unclaimed. Ms. Flowers subsequently purchased the home through a negotiated sale on May 28, 2003. The purchase price was $21,042.15. On or about July 2, 2003, an unlawful detainer notice was posted on the door of Mr. Jones's property.

Mr. Jones filed a complaint on July 28, 2003, alleging that the sale of his home was invalid because he never received actual notice of the tax sale or of his right to redeem. According to his

complaint, the tax sale resulted in an unlawful taking of his property without due process. Ms. Flowers filed a counterclaim for unlawful detainer on August 20, 2003. In his answer to the counterclaim, Mr. Jones admitted that he received actual notice of Ms. Flowers's notice to vacate, posted on the property on July 2. Mr. Jones then filed an amended complaint on September 17, 2003, adding his wife as a plaintiff, as she was the person living in the home at the time of the tax sale. Ms. Flowers filed a motion for summary judgment on October 2, 2003, arguing that the notices sent by the State complied with procedural due process. Thus, according to Ms. Flowers's motion, no fact issues remained to be determined. A similar motion for summary judgment was filed by the Commissioner on November 17, 2003.

On November 24, 2003, the Joneses filed a motion for summary judgment, arguing that the Commissioner admitted that it had no knowledge of their receiving notice of the forfeiture and subsequent sale. According to their motion, the Joneses claimed that there were no issues of fact to be resolved and, thus, summary judgment in their favor was appropriate. Attached to the motions were affidavits by Mr. Jones and Mrs. Jones averring that they never received notice of their right to redeem the property after the tax sale.

On January 14, 2004, the trial court entered an order finding that Ark. Code Ann. § 26-37-301 (Repl. 1997) complied with the constitutional requirements of due process. The trial court then granted Ms. Flowers's and the Commissioner's motions for summary judgment and denied the Joneses' motion. The trial court also granted Ms. Flowers's counterclaim for unlawful detainer and ordered that she was entitled to immediate possession of the real property. This appeal followed.

For their first argument on appeal, the Joneses aver that section 26-37-202(e) is unconstitutional because it does not require

notice of the property owner's right to redeem after the tax sale. Thus, according to their argument, the sale of the property is void, and they are now entitled to redeem the property. Ms. Flowers and the Commissioner contend that the Joneses' argument on this point is without merit.

We will not address the merits of this argument because the trial court did not rule on the issue of whether section 26-37-202(e) is unconstitutional for failing to include a notice requirement. We have repeatedly stated that a party's failure to obtain a ruling is a procedural bar to consideration of the issue on appeal. *Rigsby v. Rigsby*, 356 Ark. 311, ___ S.W.3d ___ (2004); *Bell v. Bershears*, 351 Ark. 260, 92 S.W.3d 32 (2002). Moreover, in *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567 (2003), this court held that constitutional arguments must be raised and fully developed in the trial court. It is also well settled that the burden of providing a record sufficient to demonstrate error is upon the appellant. *Id.*

The record in the instant case reveals that this issue was raised for the first time in a "Brief In Support of Motion for Summary Judgment" filed by the Joneses on November 24, 2003. In that brief, they argued that Act 626 of 1983 was constitutionally defective because it did not require notification of the "second redemption period." This issue was further raised by the Joneses in "Plaintiffs' Memorandum to Defendants' Response to Motion for Summary Judgment." The trial court's order, however, does not address this issue. Moreover, it would have been inappropriate for the trial court to consider the issue as it was raised only in the Joneses' briefs and not in their motion for summary judgment. This court has held that it would be error for a trial court on motion for summary judgment to consider any issues raised for the first time in a party's briefs or exhibits. *Eldridge v. Board of Correction*, 298 Ark. 467, 768 S.W.2d 534 (1989); *see also City of Barling v. Fort Chaffee Redev. Auth.*, 347 Ark. 105, 60 S.W.3d 443 (2001). Accordingly, the Joneses'

argument regarding the constitutionality of section 26-37-202(e) is not preserved for our review.

As their second point on appeal, the Joneses argue that the trial court erred in ruling that the State was not required to locate Mr. Jones's correct address after the tax-sale notices were returned to the State unclaimed. In other words, they argue that the trial court erred in ruling that the State's sale of his property was constitutional under section 26-37-301. They further argue that due process required the State to conduct a reasonable search of public records in an attempt to ascertain Mr. Jones's correct address before selling his property. Ms. Flowers and the Commissioner counter that an attempt to provide actual notice is all that is required in order to comply with the requirements of due process. We agree.

As a general rule, in reviewing the grant of a motion for summary judgment, this court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered. *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 343 Ark. 224, 33 S.W.3d 128 (2000). This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

However, in the instant case, the granting of the motion for summary judgment was based upon the trial court's interpretation of a statutory provision. We review issues of statutory interpretation *de novo*, as it is for this court to decide what a statute means. *Fewell v. Pickens*, 346 Ark. 246, 57 S.W.3d 144 (2001); *Hodges v. Huckabee*, 338 Ark. 454, 995 S.W.2d 341 (1999). In this respect, we are not bound by the trial court's decision; however, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. *Harris v. City of Little Rock*, 344 Ark. 95, 40 S.W.3d

214 (2001).

We begin our analysis by reviewing the language of section 26-37-301, which provides in relevant part:

> (a)(1) Subsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs, including the cost of the notice.
>
> (2) All interested parties known to the Commissioner of State Lands shall receive notice of the sale from the Commissioner of State Lands in the same manner.
>
> (b) The notice to the owner or interested party shall also indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale. The notice shall also indicate the sale date, and that date shall be no earlier than two (2) years after the land is certified to the Commissioner of State Lands.

This court has repeatedly held that in cases involving redemption of tax-delinquent lands strict compliance with the requirement of notice of the tax sales themselves is required before an owner can be deprived of his or her property. *Tsann Kuen Enters. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003); *Pyle v. Robertson*, 313 Ark. 692, 858 S.W.2d 662 (1993). Here, the Joneses would have this court read a requirement into section 26-37-301 that is simply not there, namely, that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed. The question then becomes whether such action is required in order to comply with the constitutional dictates of due process. We think not.

The Fourteenth Amendment of the United States Constitution

provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. 14, § 1. In discussing due process requirements, the United States Supreme Court has stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Our own cases interpreting this well-established rule of law are consistent with this principle.

Most recently in *Tsann*, 355 Ark. 110, 129 S.W.3d 822, this court held that section 26-37-301 satisfies the requirements of due process and provides sufficient notice to nonresident landowners prior to their property being sold. In that case, Tsann Kuen Enterprises was a nonresident corporation that purchased real property in Bentonville. After the purchase, the company moved its corporate offices and failed to notify the Benton County Tax Collector of its new address. After the company failed to pay its real property taxes for four years, the tax collector certified to the Commissioner that the taxes on the property were delinquent. The Commissioner then sent a notice of delinquent taxes to the company's last known address. The notice was returned marked "unclaimed" and "forwarding order expired." The Commissioner again sent a notice to that same address, via certified mail, stating that unless the taxes were paid, the property would be sold on July 28, 2002. That notice was returned as well, and the Commissioner then published notice in a local newspaper, as well as the statewide newspaper. No taxes were paid and the property was sold. The new owners filed a complaint in unlawful detainer. The company answered and argued, in part, that the notice provision of section 26-37-301 was unconstitutional. The trial court denied the company's request that the statute be found unconstitutional and an appeal

to this court followed.

On appeal, this court rejected the company's argument that had the State posted notice on the property or mailed notice to the physical address, the caretaker living there would have notified the company's owner, and he would have paid the taxes. In so doing, this court recognized that while Tsann had an interest in the property sold, the court also had to consider the State's interest and whether additional procedural safeguards would be unduly burdensome to the State. The court then pointed out that pursuant to Ark. Code Ann. § 26-35-705 (Repl. 1997), the taxpayer has the obligation to furnish his or her correct address.

In concluding as it did, the *Tsann* court relied on its previous decision in *Jones*, 352 Ark. 39, 98 S.W.3d 405. *Jones* also involved the sale of real property after the owner failed to pay the real property taxes. After the sale, the property owner brought suit against the Commissioner, arguing that it had failed to comply with the requirements of section 26-37-301. The trial court ruled that the Commissioner complied with the statutory provision. This court likewise held that the Commissioner strictly complied with section 26-37-301 when, prior to the tax sale, it sent notice by certified mail to the last known address of the property owner. *Id.* Moreover, this court in *Jones* held that section 26-37-301 does not require the Commissioner to take every step possible to ensure that the notice arrives in the property owner's hand. Noting that the notice was returned "unclaimed," the court went on to elaborate that the Commissioner was merely required to notify the owner at the owner's last know address. *Id.*

The *Jones* court also pointed out that the facts before it were analogous to the facts presented to the court of appeals in *Wilson v. Daniels*, 64 Ark. App. 181, 980 S.W.2d 274 (1998). In that case, the court of appeals held that the Commissioner complied with the notice requirement when it mailed a second

notice to the taxpayer's correct address, despite the fact that the notice was returned unclaimed. *Id.*

In their brief to this court, the Joneses argue that our holding in *Tsann*, 355 Ark. 110, 129 S.W.3d 822, does not apply or, alternatively, that it should be overruled as violating federal due process. They make no attempt to distinguish this court's holding in *Jones*, 352 Ark. 39, 98 S.W.3d 405, and we are unpersuaded by either of their arguments regarding *Tsann*. First, the distinction that the property owner in *Tsann* was a nonresident corporation is of no merit. The Joneses argue that the distinction is critical because their situation involves a property owner losing his homestead, while *Tsann* involved a corporation losing a rental property. To support their argument on this point, the Joneses point to the fact that the General Assembly amended section 26-37-301 in 2003, indicating a desire to afford greater protection to an owner of a homestead. A similar argument was raised and rejected by this court in *Tsann*. There, the property owner argued that the General Assembly amended section 26-37-301 by Act 1376 of 2003 in order to remedy the unfairness of the statute.[1]

In rejecting this argument, this court stated:

The problem with this argument is that Act 1376 of 2003 does

---

[1]Act 1376 provides, in part:

> If the Commissioner of State Lands fails to receive proof that the notice sent by certified mail under this section was received by the owner of a homestead . . . then the Commissioner of State Lands, or his or her designee, shall provide actual notice to the owner of a homestead . . . by personal service of process at least sixty (60) days before the date of sale.

not become effective until January 1, 2004. We have stated that a litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant. *Chapman v. Bevilacqua*, 344 Ark. 262, 42 S.W.3d 378 (2001). The general rule is that one must have suffered injury or belong to that class that is prejudiced in order to have standing to challenge the validity of a law. *Id.* Tsann Kuen cannot show that it suffered injury due to the application of the amended version of § 26-37-301 since the amended version does not become effective until January 1, 2004, and was not applied in the present case.

Id. at 122, 129 S.W.3d at 829. Likewise, the Joneses cannot demonstrate that they were injured simply because the legislature later amended section 26-37-301. A right to redeem from a tax sale is governed by the statute in force and effect at the time the sale was made. *Hogg v. Nichols*, 134 Ark. 280, 204 S.W. 211 (1918). Accordingly, the Joneses' argument simply does not support the conclusion that the holding in *Tsann* is inapplicable to homestead property owners.

Nor do we agree with the Joneses' contention that the extra safeguards sought by the property owner in *Tsann* were more burdensome than those sought here. Here, the Joneses argue that the Commissioner should be required to search the public records or the phone book in order to ascertain the property owner's correct address. Again, this argument ignores the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address.

The Joneses next contend that if this court construes *Tsann* to be applicable in this case, it should be overruled. In support of this contention, they argue that a majority of courts have held that in order to comply with due process there must be some action taken to locate a property owner's correct address. Ms. Flowers and the Commissioner contend that there is no reason

to revisit an issue already decided by this court. We agree.

The very fallacy of the Joneses' argument in this regard is supported by their admission in their brief to this court that due process does not require actual notice before depriving a property owner of his property. Citing to *Dusenbery v. United States*, 534 U.S. 161 (2002), the Joneses argue that while actual notice may not be required, such notice must be reasonably calculated to apprise a party of its rights. According to the Joneses, it is unreasonable for the State not to attempt to locate a property owner's correct address. In fact, in *Dusenbery*, the Court held that a state complied with the requirements of due process when it attempted to provide actual notice. In that case, officials seized drugs, weapons, and personal property, including cash, after arresting Dusenbery. After his conviction, the FBI sent by certified mail a notice of forfeiture proceedings to the address where he was arrested, as well as to an address in his mother's hometown. Dusenbery challenged the forfeiture, arguing that his due process rights were violated because he did not receive actual notice of the proceeding. To support his contention, Dusenbery relied on a previous Supreme Court decision in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), and argued that in that case the Court held that actual notice must be given. The Court rejected that argument and stated that there is no requirement that actual notice be given in order to comply with the requirements of due process.

Here, there is no dispute that the State attempted to provide the Joneses with notice, both via certified mail and through publication in the newspaper. Accordingly, we cannot say the trial court erred in concluding that the State complied with the provisions of section 26-37-301 and that the tax sale was valid.

Affirmed.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FILED
2004 JAN 14 PM 2:54
CAROLYN STALEY
CIRCUIT COUNTY CLERK

GARY KENT JONES AND
JEAN L. JONES

PLAINTIFFS

VS. CASE NO. CV 2003-8565

LINDA K. FLOWERS and
MARK WILCOX, COMMISSIONER OF
STATE LANDS, STATE OF ARKANSAS

DEFENDANTS

ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

On the 12th day of January, 2004, came on for consideration the pending motions in this case and from the pleadings filed herein and all other matters properly before the court the court doth find as follows:

1. The *Motion for Summary Judgment* of the defendant Flowers filed on or about October 2, 2003 is granted.

2. The *Motion for Summary Judgment* of the defendant Wilcox filed on or about November 17, 2003 is granted.

3. The Motion for Summary Judgment of the plaintiffs filed on or about November 24, 2003 is denied.

4. A.C.A. § 26-37-301, as codified at all times relevant to this action, did not violate any due process requirements of the Arkansas or United States Constitutions.

5. The Complaint of the plaintiffs is dismissed with prejudice.

6. The Counterclaim for Unlawful Detainer of the defendant Flowers is granted and the defendant is entitled to immediate possession of the subject real property.

IT IS SO ORDERED.

/s/

TIMOTHY DAVIS FOX
CIRCUIT JUDGE

1/12/04

DATE

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas

Leslie W. Steen
Clerk

January 6, 2005

Paul Johnson Jr
Attorney at Law
P.O. Box 21009
Little Rock, AR 72221

RE: 04 00449 Gary Kent Jones et ux. V. Linda K. Flowers, et al.

Dear Mr. Johnson:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/
Leslie W. Steen, Clerk

LWS:jko
cc: Mark Justin Riable
A.J. Kelly
Carol Ann Lincoln
Pat O'Brien, Clerk
(CV2003-8565)

(2)

No. 04-1477

Supreme Court, U.S.
FILED
JUL 21 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
Commissioner of State Lands,

Respondents.

On Petition For Writ Of Certiorari To The Arkansas Supreme Court

RESPONDENTS' JOINT RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 2005

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QUESTION PRESENTED

Does the Due Process Clause of the 14th Amendment require governmental taxing entities to make heroic, extraordinary, additional efforts to locate a taxpayer prior to completing a tax forfeiture sale when notice of the tax forfeiture sale has been repeatedly mailed by certified mail to the last known residence address of taxpayer, which is the address of the real property, which address was provided by the taxpayer, where the taxpayer's spouse resides, and also published notice of the sale, all in accordance with applicable statutory requirements, yet mailed notices are returned by the post office as "unclaimed" with no indication that the taxpayer has moved?

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STATEMENT OF THE CASE

Petitioner Gary K. Jones and his wife, Jean, lost their house in 2003 in a tax forfeiture sale for their failure to pay real property taxes in 1997 and later. Mrs. Jones, living in the house, twice failed and refused to pick up certified mail notices of the tax sale foreclosure proceedings. After the first written notice was returned to the Commissioner of State Lands, the Commissioner purchased a title report, showing Gary K. Jones as the record owner, and showing the real property address as the record address for Mr. Jones. The Commissioner subsequently published notice of the tax auction sale in a statewide newspaper of general circulation in that County. No purchasers came forward, and the property became subject to a negotiated sale. Respondent Linda Flowers made a purchase offer in February, 2003. The Commissioner subsequently conducted additional research into the property. The negotiated sales research indicated that the real property existed as described, remained titled in the name of Gary Jones, had the proper legal and street addresses, and continued to be owned by Mr. Jones. The Commissioner subsequently mailed another notice of the pending negotiated sale to Mr. Jones at the property address where Mrs. Jones lived. This notice was also returned unclaimed. Flowers purchased the property in a negotiated sale, and subsequently moved to evict Mrs. Jones. Mr. Jones sued to have the sale and deed set aside. Flowers counterclaimed. Mr. Jones then added Mrs. Jones as an additional Plaintiff, indicating that she was in possession of the property at the time of the tax sale. The Court granted summary judgment to Flowers and the Commissioner, confirming the sale, and denied the Joneses' motion for summary judgment, dismissing their

case. The Arkansas Supreme Court affirmed, based on multiple attempted actual notices, combined with publication, but (contrary to the assertions of Petitioner) without indicating that this was contrary to "a majority of other courts." Rehearing in the Arkansas Supreme Court was denied.

FACTUAL BACKGROUND

Gary K. Jones and Jean L. Jones, his wife, failed to pay their real estate taxes in 1997, 1998, 1999, and in all future years, so the Pulaski County Collector in 2000 certified their land as delinquent to Defendant Commissioner of State Lands. In March of 2000, Defendant Commissioner provided appropriate written notice, a proposed Petition to Redeem, and instructions, by certified mail, to Petitioner Jones. This notice told of the potential sale of the real property at public auction on or about April 17, 2002, two years in advance, in accordance with the statutory scheme. The March 2000 notice was mailed to the real property address, 717 North Bryan, Little Rock, which is the subject of this Petition, and where Mrs. Jean Jones continued to live through the hearing date in 2004, and which was the notification address of record with Pulaski County. After three attempted deliveries, the written notice was returned "unclaimed" to the Commissioner.

Subsequent to the first written notice, but before the 2002 auction date, and contrary to the assertions of Petitioner in his Petition, the Commissioner of State Lands purchased a title report from Walker Title Abstract Company concerning the parcel of real property at issue. ADD. 79, Record (R.) 94. The title report indicated that

Gary Kent Jones was the record owner of title to the property when it was certified to the Commissioner of State Lands in 2000; confirmed the legal description of the property; confirmed the tax parcel number; disclosed additional non-property tax liens on the real property; indicated that there was no mortgage on the property; indicated that Mr. Gary K. Jones continued to be the record owner of title to the real property on February 14, 2002, as there had been no change in ownership, and further indicated that this was the address of record for the owner. Appellees' Supplemental ADD. 19, R. 103.

On or about April 1, 2002, after the title report, the Commissioner published notice of the sale auction in a state-wide newspaper, which was also the newspaper of record in Pulaski County, with the sale date and redemption information. On the sale date, 4/17/02, no bids were received, thereby subjecting the property to a negotiated sale with the Commissioner.

On or about February 5, 2003, Appellee Flowers submitted an offer to purchase the real property from the Commissioner. After receiving the offer from Flowers, and contrary to the assertions of Petitioner Jones, Respondent Commissioner performed additional research, called "negotiated sales research." ADD. at 80. This involved, among other things, another review of real property records to confirm ownership and address information, a visit to the property to determine whether it still existed as described in the legal description and deed records, and a physical description of the house and the immediate vicinity. Appellees' Supplemental ADD. 26, R. 110.

On February 19, 2003, the Commissioner, by certified mail, sent written notice of a pending negotiated sale to

Gary Kent Jones at 717 N. Bryan Street, Little Rock, the record owner of the real property, at the real property address. As stated before, this was Mr. Jones' last known address. Mrs. Jones, living at the property, again failed and refused to pick up this mail. After three delivery attempts, this notice was subsequently returned to the Commissioner's office marked "unclaimed."

The Commissioner approved Flowers' Offer on April 11, 2003; the Arkansas Attorney General approved Flowers' Offer on April 23, 2003; and the Limited Warranty Deed was issued to Flowers on May 28, 2003.

Mr. Jones has, at various times in this litigation and on appeal, claimed both that the real property at issue is his "homestead" but also claims to have moved out of the home into an apartment. ADD. 48. Nevertheless, Jones failed to file with the Pulaski County Recorder (and Clerk), the Pulaski County Assessor, or the Pulaski County Treasurer, any notice of a change in his address for the mailing of notices of taxes due on the real property. The notices at issue were mailed to Mr. Jones' last known address. Mrs. Jean Jones continued to live in the home on N. Bryan Street, through the hearing date in the trial court in 2004, which is also the same location where Respondent Commissioner repeatedly mailed the notices at issue herein. Mrs. Jean Jones was at all times relevant to this case, the wife of Petitioner Gary K. Jones.

PROCEDURAL BACKGROUND

Petitioner Gary Kent Jones initiated these proceedings by filing a complaint in Circuit Court in Pulaski County, Arkansas, seeking to cancel and set aside Respondent

Commissioner of State Land's Limited Warranty Deed to Respondent Linda K. Flowers concerning certain real property in Pulaski County, Arkansas (717 N. Bryan St., Little Rock), and challenging Arkansas Code Annotated Section 26-37-301 (but no other sections of the Arkansas Code, and without attacking the statutory scheme as a whole). ADD. 1. Jones later added his wife, Jean, as Plaintiff, as well, since she was in possession of the premises at all times relevant to these proceedings. ADD. 19. Both Defendants, Respondents here, denied the claims. Flowers counterclaimed for unlawful detainer, ADD. 8, which Petitioner and his spouse denied.

All parties filed cross-motions for Summary Judgment, as the facts were not disputed. The Trial Court ruled against the Joneses on Arkansas Code Annotated Section 26-37-301, granting Summary Judgment to Respondents Flowers and the Commissioner on their Motions, and denying the Jones' Motion for Summary Judgment and dismissing their Complaint, by Order dated January 14, 2004. The Arkansas Supreme Court subsequently heard the appeal of this matter, involving both Mr. and Mrs. Jones without oral argument. On appeal, the Arkansas Supreme Court unanimously affirmed the judgment of the trial court. Contrary to the assertions of Petitioner, the Arkansas Supreme Court held that strict compliance with the statute (Arkansas Code Annotated Section 26-37-301) is required, but that Due Process does not require the Commissioner to take every extraordinary step possible to guarantee that the written notices arrive in the property owner's hands. Pet. App. 8a. The Arkansas Supreme Court also ruled that Jones failed to preserve for review any challenge to Ark. Code Ann. Sec. 26-37-202(e) (concerning the redemption period). The Joneses' Petition

for Rehearing was also unanimously denied without oral argument. Pet. App. 14a.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. THE ALLEGED CONFLICTS IN THE CIRCUITS AND OTHER COURTS ARE ILLUSORY SINCE THE CASES CAN BE RECONCILED EASILY.

1. Arkansas Supreme Court Properly Stated the Correct Rule of Law.

The question presented is whether the Due Process Clause requires a governmental taxing entity to make heroic, extraordinary efforts to locate a delinquent taxpayer, in addition to those described herein, when notice of a tax forfeiture sale is returned "unclaimed" before taking the property. The Arkansas Supreme Court, concluding a series of cases involving the same issue in a number of different contexts, precisely described the rule of law: No state shall deprive any person of property without due process of law. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Pet. App. 7a (*citing*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Petitioner erroneously asserts an "entrenched conflict" within the courts concerning the question of notice. This

putative conflict is illusory. The Arkansas line of cases is easily reconciled with the cases cited by Petitioner.

Petitioner relies on *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005) as his most significant case. Yet *Plemons* vacated the trial court's decision in favor of the delinquent taxpayer and remanded. The *Plemons* Court stated that "some follow-up" would be required when initial notice of a tax sale is returned; but such follow-up might simply be an additional attempt to re-send the notice. *Id.* at 576. Impracticable and extended searches, such as consulting a telephone directory, asking tenants in person, or asking a mortgagee bank, "are not required in the name of Due Process." *Id.* at 578. The *Plemons* Court was explicit in stating that it "did not agree that reasonable follow-up compelled such efforts." *Id.* at 577. Policy reasons also dictate this result, as Petitioner's suggested extended searches would impose an undue financial and administrative burden on Respondent Land Commissioner (which would have been paid for by Respondent purchaser, Flowers).

Indeed, the *Plemons* Court cited precisely the same cases as did the Arkansas Supreme Court here: *Mullane*, and *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). Pet. App. 11a. The Constitution only requires reasonable efforts, given all the circumstances of a particular case, not receipt of actual notice. *Plemons*, 396 F.3d at 577.

Here, there is no question that Respondent Commissioner exceeded the requirements of *Plemons* by taking five separate, discrete steps to notify the taxpayers: (1) initial notice of the sale and right to redeem by certified mail to the record address provided by Pulaski County;

(2) obtaining a title search verifying the property information, ownership, and record address; (3) publishing notice of the sale and right to redeem in a state-wide and county-wide publication; (4) executing a negotiated sales research for record information on ownership and verifying the existence of the house on the real property; and (5) providing a second formal certified mail notice of the pending negotiated sale and right to redeem. *Plemons* did not require these types of steps. Nor did *Plemons* involve a delinquent taxpayer who lived on the real property and simply refused to sign for certified mail, as Mrs. Jones did here.

The second case primarily cited by Petitioner is also in agreement with the rationale and result here. In *Akey v. Clinton County*, 375 F.3d 231 (2nd Cir. 2004), the decision agreed with the Arkansas Supreme Court. It is unnecessary to search the internet, or the telephone book, or voting records, and the like to find a delinquent taxpayer, in order to comply with Due Process requirements. *Akey*, 375 F.3d at 237. The *Akey* Court indicated that a delinquent taxpayer's different real property address, in the same county, would be "of record" and so notice to that address would be required. Yet in the case *sub judice*, that is precisely what the Land Commissioner did: examine title records and other documents in the County real property records to find Mr. Jones. It is not disputed that Mr. Jones rented his separate apartment and so would not have had another address "of record" in the real property records in Pulaski County, Arkansas. Nor is it disputed that Mr. and Mrs. Jones were married and had not filed any divorce or separation papers in any court of record, and so made no formal "record" of their purported "separation." The *Akey* inquiry was whether the state acted

reasonably under all the circumstances, not whether the property owners actually received notice. *Id.* at 235. Respondent Land Commissioner complied fully with the *Akey* requirements and acted both reasonably and constitutionally under all the circumstances.

The third significant case cited by Petitioner also agrees with the result in the instant case. In a personal property forfeiture case, *Garcia v. Meza*, 235 F.3d 287 (7th Cir. 2000), the Seventh Circuit declined to impose an affirmative duty on the government to seek out claimants in each case where the initial notice is returned undelivered, or to require actual notice in every case. *Garcia*, 235 F.3d at 291. Instead, *Garcia* also followed *Mullane*, as did the Arkansas Supreme Court here. *Garcia* specifically involved a single notice of forfeiture, which was returned undeliverable. The remedy in *Garcia* was to require a second attempt at written notice, *id.* at 291, much less than was done by Respondent Commissioner in Mr. Jones' case here.

Many of the other cases cited by Petitioner concern cases decided before *Dusenbery v. United States*, 534 U.S. 161 (2002), and so are no longer applicable. Indeed, Petitioner failed to cite to *Dusenbery* in its Petition, although *Dusenbery* resolves the issue in this case: what notice is required by the Due Process case involving forfeiture of property. Indeed, the Arkansas Supreme Court considered Petitioner's briefs in the Court below dispositive on this issue:

> The very fallacy of the Joneses' argument (concerning efforts to locate a property owner's correct address) is supported by their admission in their brief to this court that due process does not require actual notice before depriving a property

> owner of his property. Citing to *Dusenbery*, the Joneses argue that while actual notice may not be required, such notice must be reasonably calculated to apprise a party of its rights. . . .
>
> Here, there is no dispute that the State attempted to provide the Joneses with notice, both via certified mail and through publication in the newspaper. Accordingly, we cannot say the trial court erred in concluding that the State complied with the provisions of (Ark. Code Ann.) section 26-37-301 and that the tax sale was valid.

Pet. App. 11a.

Dusenbery held that proof of actual receipt of notice is not required by the Due Process clause in a property forfeiture case, and declined to adopt the kind of bright-line rule which Petitioner seeks herein. *Dusenbery*, 534 U.S. 161. While the context involved personal property and the federal Due Process standard in the Fifth Amendment, it is equivalent to the issues herein. *Dusenbery* also resolved many of the precise conflicts cited so fervently by Petitioner herein.

The errors Petitioner asserts herein consist primarily of his assertion that the Arkansas Supreme Court misapplied a properly stated rule of law. In other words, the importance of this case is primarily its importance to Petitioner, but not to the general public. The putative "conflicts" cited by Petitioner in the cases do not have any viable importance for the proper administration of the law.

2. Petitioner has failed to preserve for review any challenge to Arkansas Code Annotated Section 26-35-705.

Petitioner has no right to challenge Section 26-35-705. Arkansas Code Section 26-35-705 provides that the ***taxpayer*** (Jones) has an obligation to furnish the correct address to the taxing authorities in the event that the taxpayer changes address. Ark. Code Ann. Sec. 26-35-705. In a 1993 amendment to this code section, tax notices are sent "to the address provided by the taxpayer." Ark. Code Ann. Sec. 26-35-705. There is no dispute that the notices in this matter were mailed to the address provided by the taxpayers, Mr. and Mrs. Jones. There is no dispute that Respondent Land Commissioner, like the Arkansas Supreme Court, relied upon the requirements of Section 26-35-705, since Petitioner did not challenge the application of this law in any way in any court below.

Petitioner now attempts to attack Section 26-35-705 by stating that the Arkansas Supreme Court "rejects" the "majority" approach for obtaining additional information about a delinquent taxpayer's mailing address. Contrary to Petitioner's assertions, this is not what the Arkansas Supreme Court said because the Joneses did not challenge this law in the courts below. The Joneses argued below that the Commissioner should be required to search voting records or phone books in order to ascertain the property owner's correct address. Pet. App. 10a. As the Arkansas Supreme Court said, the Joneses' argument "ignored the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address." Pet. App. 10a. The Joneses ***ignored*** the applicable law, did not challenge it in any way, and certainly did not make any record of a challenge to Sec. 26-35-705 in any way in any of the courts below.

The constitutionality of Section 26-35-705 was not an issue at all in the trial court, was not briefed by Petitioner in the Arkansas Supreme Court, indeed, was not even cited by Petitioner in his three briefs to the Arkansas Supreme Court. There is no ruling in the courts below concerning Ark. Code Ann. Sec. 26-35-705. There is no record developed on the issue of the constitutionality of Sec. 26-35-705. Accordingly, the issue of the constitutionality of Section 26-35-705 is not preserved for review in the United States Supreme Court, because it was not preserved for review in the Arkansas Supreme Court. *See, e.g., Rigsby v. Rigsby*, 356 Ark. 311 (2004); Pet. App. 4a. Certiorari should be denied, and all review precluded, where there is an adequate basis in state law to decide the issue – Joneses' procedural default. Jones has done nothing at all to challenge that state law (Ark. Code Ann. Sec. 26-35-705) prior to raising the issue in his petition for certiorari, and so cannot challenge it now. *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

3. Essential Facts Have Been Omitted or Misstated by Petitioner.

Petitioner here has failed to provide the Court with a complete description of the activities undertaken by the Commissioner prior to the sale. Over and over, Petitioner states that "the State made no effort to locate Mr. Jones before selling his house" Pet. 2; and "made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale." Pet. 4. These statements are false.

The Commissioner did make additional efforts to locate Mr. Jones, including conducting a title search prior

to publication ir. 2002, Appellees' Supp. ADD. 19; and conducting "negotiated sales research" prior to the final sale, Appellees' Supp. ADD. 26. The Commissioner also published notice in the state-wide newspaper, which was also a newspaper of general circulation in Pulaski County, where Petitioner and his wife both live. Note, additionally, that the statutory scheme in Arkansas, and the facts as developed in this case, required that these steps (including two separate certified mail notices) take place over a period of three years, from February of 2000 to May of 2003, in order to give the taxpayers ample time to correct any administrative errors, oversights, or temporary inability to pay. There was no "rush to judgment" in this case, unlike so many of the cases cited by Petitioner in his Petition.

Petitioner's erroneous argument that the Commissioner should have been required to look for additional addresses for Gary Jones wrongly assumes that the Commissioner knew that Mr. Jones did not reside at 717 N. Bryan Street. But nothing in the records provided to the Commissioner indicated Mr. Jones did not live there. The certified mail was returned "unclaimed" but did not indicate that a forwarding order had expired, or that Mr. Jones did not occupy the property. Petitioner Jones made no record, in the courts below, of any official change of address, or any notification to the taxing authorities, or any other indication in real estate records that would indicate Mr. Jones (but not Mrs. Jones) had moved out of the real property at N. Bryan Street.

Petitioner also omits from his Petition the facts he intentionally added in the trial court: that he remained married to his wife during all this time; that she continued to occupy the real property on North Bryan at all times

relevant to this case; that she became a Defendant, Counter-claimant, and Appellant in the case at his behest; and that Mrs. Jones, his wife, is the person who failed to claim the certified mail sent repeatedly to the real property address at 717 N. Bryan where Mrs. Jones continued to live all through these years (1997 to 2004). Mrs. Jones is no longer a part of these proceedings, but she was involved even in the Arkansas Supreme Court. Pet. App. 1a.

These essential facts change the nature of the legal issues before the Court. The real property records in Pulaski County could not have yielded any other information in this matter, no matter how hard Respondent Land Commissioner searched, and no matter now much money Respondent Land Commissioner spent, because Petitioner and his spouse left all of those records intact as a result of Mrs. Jones' continued occupancy of the house on N. Bryan. It is not the Land Commissioner's failures that led to the forfeiture of Petitioner's real property; instead, it was deliberate ignorance, or steadfast indifference, to significant legal events, by one of the primary parties – and the occupant of the land – in the courts below. Mrs. Jones' judicious decision not to pursue this matter any further should not be construed to permit Mr. Jones to make spurious arguments that he could not possibly have made successfully in the Courts below.

II. THE DECISION BELOW AGREES WITH THIS COURT'S PRECEDENTS, IS FAIR, AND IS RIGHT ON THE MERITS.

Certiorari should be denied because the Court's decision below is the right result under the particular facts and circumstances of this case. A well-respected Court has

unanimously concluded that the trial court's judgment should be affirmed. There is no violation of Petitioner's right to due process under the 14th Amendment. A case by case analysis, applying the appropriate standard, continues to be, and should continue to be, the applicable law. Petitioner would have this Court replace more than twenty years of jurisprudence on this subject, with a bright-line rule requiring a much higher level of searching for a delinquent taxpayer than any court has ever imposed under this Court's applicable Due Process rulings.

Petitioner agrees with the Arkansas Supreme Court on the applicable case precedent, as least as far as *Mullane* is concerned. Indeed, Petitioner, Pet. App. 13, quotes *Mullane* in a fashion nearly identical to the quotation from the Arkansas Supreme Court decision herein. Pet. App. 7a.

Petitioner now fails to identify *Dusenbery*, 534 U.S. 161, as an applicable case, although he cited to it in the courts below. The United States Constitution does not require that actual notice of a right to redeem be received in order to comply with Due Process. *Dusenbery v. United States*, 534 U.S. 161 (2002). Under *Dusenbery*, in order to comply with federal Due Process requirements, the government need only make good faith attempts to provide actual notice by following statutory procedures, but does not have to guarantee receipt of actual notice, above and beyond statutory requirements ***which were not challenged in the courts below***.

The holding in *Dusenbery*, in accordance with applicable case precedents also cited herein, indicates that reasonable good faith attempts to locate the address for the delinquent taxpayer are sufficient, even if unsuccessful. The Land Commissioner's five-step attempts to notify

Mr. and Mrs. Jones here, over the course of several years, comport fully with Due Process. Mr. and Mrs. Jones received all of the process that they were due, under the circumstances.

Petitioner concludes by stating that the Land Commissioner could have ascertained Petitioner's address by consulting telephone directories, voter registration records, or state income tax rolls. Petitioner further states that such a search is mandated by *Mullane* and its progeny. But Petitioner does not cite a single case where these types of searches are required in real property tax forfeiture cases. To the contrary, cases cited by Petitioner uniformly hold the opposite, as set forth in Section I. A, above.

Petitioner reaches his wrong result by misconstruing the facts of the case and by repeating, over and over, that the Land Commissioner did nothing more than mail notice to Petitioner Jones twice. The Land Commissioner's separate searches of real property records, publication in the newspaper, and sequencing of those events, over the course of three years, comports fully with due process. In light of Mrs. Jones' con[illegible]ed occupancy of the house on N. Bryan during the entire time, nothing more should be required.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 04-1477

IN THE
Supreme Court of the United States

GARY KENT JONES,
Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
COMMISSIONER OF STATE LANDS,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Arkansas

PETITIONER'S REPLY

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August 2005

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PETITIONER'S REPLY

This case presents the question whether, when mailed notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to make any additional effort to locate the owner before taking the owner's property. The Brief in Opposition (BIO) provides no basis to deny certiorari.

1. Respondents Ignore All But Three Of The Cases That Comprise The Split Among The Courts And Either Misstate Or Fail To Grasp The Import Of The Cases They Discuss.

Respondents assert that the entrenched conflict among the courts that have addressed the question presented is "illusory" and that "[t]he Arkansas line of cases is easily reconciled with the cases cited by Petitioner." BIO 7. But the BIO ignores 30 of the 33 cases cited in the petition as examples of the deep and intractable conflict. In the tax sale context, the petition cites decisions of fourteen different courts on the majority side of the split, Pet. 6-7 & n.5-6, six courts other than Arkansas courts on the minority side, Pet. 8 n.7, and two courts that have taken an intermediate approach, Pet. 9 n.8. In the context of forfeitures for reasons other than delinquent taxes, the petition cites eight decisions on the majority side, Pet. 10 n.9, and three that reject the majority rule, Pet. 10-11.

Moreover, of the three cases respondents discuss, they misstate two and fail to grasp the import of the third. First, respondents err by asserting that the decision below can be reconciled with *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005). BIO 7. *Plemons* held that "when prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient." 396 F.3d at 576. The court below held that

due process does *not* require "that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed." Pet. App. 6a. Thus, the decision below directly conflicts with *Plemons* and the decisions of the courts following the majority rule, *see* Pet. 6-7 & n.5-6, but it is consistent with the approach taken by courts in several other states. *See* Pet. 8 n.7.

Respondents attempt to explain away the conflict with *Plemons* by claiming that the State here did enough to satisfy *Plemons* by sending two certified letters that were returned unclaimed, performing a title search and negotiated sale research, and providing constructive notice by publication. BIO 7-8. These acts are insufficient to satisfy the due process requirements articulated in *Plemons*. The return of the certified letters triggered the State's obligation to "make reasonable efforts to learn [Mr. Jones's] correct address before constructive notice will be deemed sufficient." 396 F.3d at 576. The State's other actions were not efforts to learn Mr. Jones's correct address. The title search confirmed that Mr. Jones owned the property, but did not shed any light on his correct mailing address.[1] The negotiated sales research verified the existence of the house, but was not calculated to discover Mr. Jones's correct address. Publication is a means of providing constructive notice, not a means to ascertain a correct address,

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[1]Although respondents claim that the State "examine[d] title records and other documents in the County real property records to find Mr. Jones," BIO 8, no evidence suggests that, while conducting a title search to identify those with an interest in the property to be sold, the State sought to determine Mr. Jones's correct address by examining records relating to any other property.

and is constitutionally sufficient only after reasonable efforts to learn the correct address have failed.

Respondents further err by claiming that *Plemons* held that consulting a telephone directory or making inquiry with the occupants of a property are "impracticable and extended searches" not required by due process. BIO 7. *Plemons* held only that those techniques were not compelled in that case, because the record showed that the telephone directory would not have yielded the correct address, and because contacting the tenants at the property was not likely to be successful after notices sent to "Occupant" at the property's mailing address had been returned as undeliverable. 396 F.3d at 577. But *Plemons* acknowledged that "checking the local telephone directory may be reasonable in a given situation." *Id.; accord Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 85 (Ga. 2003); *Rosenberg v. Smidt*, 727 P.2d 778, 780 (Alaska 1986). In this case, it is undisputed that reference to the local telephone directory would have yielded Mr. Jones's correct address. ADD 48-49. Similarly, contacting the occupants of the property at issue here would not have imposed an unreasonable burden because State personnel visited the property as part of the negotiated sale research. SUPP ADD 26. Contacting the occupants would have yielded Mr. Jones's correct mailing address, and leaving a notice at the house would have apprised Mr. Jones of the pendency of the sale.[2] Significantly, the BIO does not mention *Plemons'* admonition that "it is, at the very least, reasonable to require examination (or re-examination) of all available public

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[2]Indeed, the unlawful detainer notice posted on the door of the property *after* the 30-day post-sale redemption period had passed was discovered by the occupants of the house who then contacted Mr. Jones, providing him his first actual notice of the sale of his home. Pet. App. 2a-3a, ADD 1, 11.

records when initial mailings have been promptly returned as undeliverable." 396 F.3d at 577. In this case, the State could have located Mr. Jones's correct address by consulting publicly available voter registration rolls or state income tax records.

Respondents also wrongly assert that the decision below is consistent with *Akey v. Clinton County*, 375 F.3d 231 (2d Cir. 2004). BIO 8-9. *Akey* held that when a foreclosure notice sent to an outdated address was returned undeliverable, due process required a reasonably diligent search for the correct address, and that an inclusive search of the public record would suffice. 375 F.3d at 237. In this case the government could have located Mr. Jones's correct address by consulting public records, but the State failed to make further efforts to find Mr. Jones's correct address following return of the two certified letters. *Akey* held that such efforts are required by due process; the court below held the opposite.[3]

Respondents are correct that *Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000), "decline[d] to impose an affirmative duty upon the government to seek out claimants in each case where its initial notice is returned undelivered." *See* BIO 9.

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[3] *Akey*, 375 F.3d at 237, noted the statement in *Kennedy v. Mossafa*, 789 N.E.2d 607, 612 (N.Y. 2003), that the "reasonable search of the public record" required after a notice is returned undeliverable "does not necessarily require searching the Internet, voting records, motor vehicle records, the telephone book or other similar resource[s]." But *Kennedy* also held that "[t]he public record does not consist solely of the tax roll." *Id.* at 611. At any rate, because *Akey* and *Kennedy* require a reasonably diligent search for the taxpayer's correct address after initial notice is returned, both cases conflict with the decision below.

That some federal circuits reject the majority rule only emphasizes the need for this Court to resolve the split.

2. *Dusenbery* Is Inapposite Because Mr. Jones Does Not Claim That Due Process Requires Actual Notice And *Dusenbery* Did Not Address The Question Presented Here.

Respondents err by claiming that "*Dusenbery* resolves this case." BIO 9 (citing *Dusenbery v. United States*, 534 U.S. 161 (2002)). *Dusenbery* simply rejected the notion that *actual notice* is required while reaffirming the rule that the government's efforts must be reasonably calculated under all the circumstances to apprise the interested party of the pendency of the forfeiture. 534 U.S. at 170 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Thus, *Dusenbery* would be dispositive only if Mr. Jones claimed that due process requires actual notice before property may be taken. That is not his position, as even respondents concede. *See* BIO 9 (quoting Pet. App. 11a (noting Mr. Jones's view that "due process does not require actual notice")). Rather, Mr. Jones maintains that when mailed notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to take further reasonable steps to locate the owner before taking the property.

In *Dusenbery*, the government's notice was sent by certified mail and was actually received at the institution where Mr. Dusenbery was incarcerated. 534 U.S. at 164-65. The Court would have addressed the issue presented here only if the notice mailed to Mr. Dusenbery had been returned undelivered, thus informing the government that its attempt to give notice had failed. Because *Dusenbery* did not address the question presented, the deep split in authority presented by this case remains unresolved.

Indeed, the Fourth Circuit in *Plemons* and the Georgia Supreme Court in *Hamilton* have specifically recognized that *Dusenbery* does not answer the question presented. *Hamilton* criticized the trial court for improperly relying on *Dusenbery* as support for the conclusion that due process requires no more than a search of tax and deed records before resorting to publication. As *Hamilton* explained, "the Supreme Court [in *Dusenbery*] was only reaffirming the principle, drawn from *Mullane* . . . , that an interested party is entitled to notice which is reasonably calculated, under all of the circumstances, to apprise him of the pendency of a tax sale. The Supreme Court did not alter the current constitutional standard, which is that the notice must be sent to those interested parties whose names and addresses are ascertainable by 'reasonably diligent efforts.'" 589 S.E.2d at 84 (citations omitted). *Plemons* similarly explained the holding in *Dusenbery*: "[A]lthough the Constitution does not always require actual receipt of notice, it does always require efforts 'reasonably calculated under all the circumstances to apprise' a party 'of the pendency' of the deprivation of property." 396 F.3d at 573 (quoting *Dusenbery*, 534 U.S. at 168-71).

3. Mr. Jones Does Not Challenge Section 26-35-705; Thus, Respondents' Claim That Such A Challenge Was Not Preserved For Review Is Irrelevant.

Respondents assert that "Petitioner has no right to challenge [Ark. Code Ann.] Section 26-35-705," BIO 11, a statute requiring taxpayers to notify the taxing authorities of a change of address. Mr. Jones does not challenge that statute. Thus, respondents' discussion of whether "the issue of the constitutionality of Section 26-35-705 [has been] preserved for review" is inapposite. BIO 12. The only reference to Section 26-35-705 in the petition is the observation that any failure by

a taxpayer to comply with a state statute requiring notice of a change of address cannot relieve the State of its due process obligations under the Fourteenth Amendment, and that the failure of the Arkansas Supreme Court to adhere to this principle provides a further reason to grant certiorari. *See* Pet. 14-15 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983) ("a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide notice)).

4. The Petition Does Not Omit Or Misstate Any Essential Fact, And Respondents' Assertion That The Decision Below Is Right On The Merits Underscores The Need For Review.

Respondents maintain that Mr. Jones received due process and attempt to recast the issue as whether the Fourteenth Amendment requires "every extraordinary step possible to guarantee that the written notices arrive in the property owner's hands," BIO 5, "heroic, extraordinary efforts," BIO 6, and a "higher level of searching . . . than any court has ever imposed." BIO 15. Respondents' hyperbole notwithstanding, this case presents an excellent vehicle for the Court to apply the *Mullane* standard to circumstances where the government knows that its initial efforts to notify a property owner of an impending sale have failed.

Respondents contend that the petition falsely "states that 'the State made no effort to locate Mr. Jones before selling his house' Pet. 2; and 'made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale.' Pet. 4." BIO 12. Respondents are wrong.

First, respondents have selectively quoted from the petition in a manner that omits important qualifying language. On page 2, the petition states:

> The State sent two notices to Mr. Jones by certified mail, but both were returned unclaimed. Although the State knew that its attempts to provide notice had been ineffective, and although Mr. Jones's correct mailing address was readily available from a variety of sources, the State made no effort to locate Mr. Jones before selling his house.

On page 4, the petition states:

> Although the State knew that Mr. Jones had not received the two notices it sent by mail, the State made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale, even though Mr. Jones's proper address could have been discovered with minimal effort. Moreover, State personnel apparently visited the Bryan Street property and viewed the house as part of the negotiated sale process, but the State did not post a notice at the house.

When read as a whole, both of these passages assert that the State made no *further* effort to locate Mr. Jones's correct mailing address *after* the mailed notices were returned.

Second, respondents suggest that the State took two steps to ascertain Mr. Jones's correct address: performing a title search and conducting negotiated sale research. BIO 12-13. As discussed on page 2 above, there is no evidence that either of these tasks was part of an effort to ascertain Mr. Jones's correct mailing address once the State knew that its attempts to provide notice by mail had failed.

Respondents argue that Mr. Jones "wrongly assumes" that the State knew he had moved from the Bryan Street house. BIO 13. That Mr. Jones had moved is irrelevant. The record shows that the State knew that its mailed notices had not been received, and that is what triggered the State's constitutional obligation to take further reasonable steps to locate Mr. Jones before taking his property. Similarly, respondents spill much ink blaming Mr. Jones's estranged wife for not claiming the two certified letters, even though she was not the record owner of the property and the letters were addressed to Mr. Jones alone. Blaming Mr. Jones's estranged wife for not claiming letters addressed to someone else does not negate the undisputed fact that the State could have located Mr. Jones's correct address with minimal effort. And like respondents' other efforts at obfuscation, it does nothing to diminish the need for this Court to resolve the deep division among the federal and state courts and provide much-needed certainty for state and local authorities, property owners, and purchasers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

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Counsel of Record for Respondent Flowers

Petition For Certiorari Filed May 5, 2005
Certiorari Granted September 27, 2005

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Sixth Division, Case No. CV 2003-8565

July 28, 2003	Complaint
August 11, 2003	Answer of Defendant Flowers
August 12, 2003	Answer of Defendant Wilcox, Commissioner of State Lands
August 20, 2003	Defendant Flowers's Counterclaim for Unlawful Detainer
September 2, 2003	Answer to Counterclaim
September 17, 2003	Amended Complaint
September 30, 2003	Answer of Defendant Wilcox, Commissioner of State Lands, to Amended Complaint
October 2, 2003	Motion for Summary Judgment by Defendant Flowers
October 16, 2003	Plaintiffs' Response to Motion for Summary Judgment by Defendant Flowers
November 17, 2003	Motion for Summary Judgment by Defendant Wilcox, Commissioner of State Lands

November 24, 2003	Plaintiffs' Motion for Summary Judgment
December 3, 2003	Response of Defendant Flowers to Plaintiffs' Motion for Summary Judgment
December 9, 2003	Response of Defendant Wilcox, Commissioner of State Lands, to Plaintiffs' Motion for Summary Judgment
January 6, 2004	Plaintiffs' Memorandum in Reply to Defendants' Responses to Plaintiffs' Motion for Summary Judgment
January 14, 2004	Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment
January 28, 2004	Notice of Appeal

Arkansas Court of Appeals, No. CA 04-00449

July 22, 2004	Appellants' Brief and Addendum
August 26, 2004	Appellees' Joint Brief and Supplemental Addendum
September 17, 2004	Appellants' Reply Brief

Supreme Court of Arkansas, No. 04-449

September 27, 2004	Case assumed by Arkansas Supreme Court
November 18, 2004	Opinion Affirming Trial Court's Decision
December 6, 2004	Appellants' Petition for Rehearing
December 20, 2004	Appellees' Response to Petition for Rehearing
January 6, 2005	Order Denying Petition for Rehearing

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
6TH DIVISION

FILED
2003 JUL 28 AM 9:04
CAROLYN STALEY
CIRCUIT COUNTY CLERK

GARY KENT JONES PLAINTIFF

v No. CIV 2003-8565

LINDA K. FLOWERS and
MARK WILCOX, COMMISSIONER OF STATE LANDS,
STATE OF ARKANSAS DEFENDANTS

COMPLAINT

For his complaint, plaintiff states as follows:

1. The plaintiff is the owner of the described real property in Pulaski County, Arkansas:

Lot 10 and the South 20 feet of Lot 12,
Success Addition to Little Rock, Arkansas
(717 N. Bryan St.).

The Plaintff has owned this property since 1967, in fee simple.

2. Defendant Linda K. Flowers is a resident of Pulaski Count, Arkansas. Defendant Mark Wilcox is named in his capacity as Land Commissioner of the State of Arkansas.

3. Jurisdiction and venue is proper in this forum.

4. On or about July 2, 2003, plaintiff was notified that his home had been sold by the State of Arkansas.

5. Attached hereto is "Limited Warranty Deed No. 140635 for Forfeited Property Sold", dated May 28, 2003, from Mark Wilcox, Commissioner of State Lands, as Grantor, to Linda K. Flowers.

6. The property was sold for $21,042.15. The market value of the property exceeds $70,000.00.

7. The aforementioned deed is deficient in that plaintiff was never given actual notice of the sale and never given actual notice of the right to redeem after sale. The failure to give actual notice to plaintiff results in an unlawful taking of property without due process in violation of the Constitutions of the United States and the State of Arkansas.

WHEREFORE, Plaintiff prays the "Limited Warranty Deed No. 140635" be canceled and set aside; that the Defendant Linda K. Flowers be restrained and enjoined from taking any act based upon such deed; that plaintiff recover from defendants his attorney's fees incurred in the prosecution of this cause, court costs and all other relief the Court may deem appropriate.

Respectfully Submitted,

/s/ Paul Johnson
Paul Johnson, Bar No, 67029
P.O. Box 21009
Little Rock, AR 72221
(501) 227-9292

VERIFICATION

STATE OF ARKANSAS]
] ss
COUNT OF PULASKI]

I, Gary Keny Jones, after first being duly sworn, state that the allegations made in this complaint are true and correct to my knowledge and belief.

/s/ Gary Kent Jones
Gary Kent Jones

Subscribed and sworn to on July 25, 2003.

/s/ Nancy A. Bosley
Notary Public

My commission expires August 20, 2012.

[Notary Seal Omitted In Printing]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FILED
2003 SEP 17 AM 8:26
CAROLYN STALEY
CIRCUIT COUNTY CLERK

GARY KENT JONES and
JEAN L. JONES PLAINTIFFS

v No. CIV 2003-8565

LINDA K. FLOWERS and
MARK WILCOX, COMMISSIONER OF STATE LANDS,
STATE OF ARKANSAS DEFENDANTS

AMENDED COMPLAINT

For their amended complaint, plaintiffs state as follows:

1. All allegations in the original complaint as incorporated herein.

2. Jean L. Jones is added as a plaintiff as she was in possession of the subject property at the time of the tax sale.

3. The correct description of the subject property is:

Lot 10 and the South 20 feet of Lot 11,
Success Addiction to Little Rock, Arkansas
(717 N. Bryan St.).

Respectfully submitted,

/s/ Paul Johnson

Paul Johnson, Bar No. 67029
P.O. Box 21009
Little Rock, AR 72221
(501) 227-9292

cc. Mark Riable, Esq.
Carol L. Lincoln, Esq.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

GARY KENT JONES — PLAINTIFF
JEAN L. JONES

VS. — CASE NO.: CIV 03-8565

LINDA K. FLOWERS and — DEFENDANT
MARK WILCOX, COMMISSIONER OF
STATE LANDS, STATE OF ARKANSAS

AFFIDAVIT

STATE OF ARKANSAS]
]
COUNT OF PULASKI]

I, Gary Kent Jones, after being duly sworn, state on oath as follows:

1. I purchased in 1967 the following property in Pulaski County, Arkansas, to wit:

Lot 10 and the South 20 feet of Lot 11,
Success Addition to Little Rock, Arkansas
(717 N. Bryan St.)

The property is the homestead of my wife and myself.

2. I received no notice from the Commissioner of State Land that my homestead would be sold as tax-delinquent land.

3. I received no notice from the Commissioner of State Lands that I had the right to redeem my homestead after it was sold as tax-delinquent land.

4. I have lived a 7901 Foxchase, Apt 3, Little Rock, Arkansas 72207 since 1993. I have been listed in the Little Rock, Arkansas phone book at that address since 2000. I have been on the Pulaski County voter rolls at that address since 1993. I have been on the state income tax rolls at that address since 1993. I have been employed by the Social Security Administration for over 20 years and my address at that employment is 7901 Foxchase, Apt, 3, Little Rock, Arkansas, 72207.

/s/ Gary Kent Jones
Gary Kent Jones

Subscribed and sworn to on November 24, 2003.

/s/ Nancy A. Bosley
Notary Public

My Commission expires August 20, 2012

[Notary Seal Omitted In Printing]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FILED
2003 NOV 25 PM 1:24
CAROLYN STALEY
CIRCUIT COUNTY CLERK

GARY KENT JONES
JEAN L. JONES — PLAINTIFF

V. — CASE NO. CIV 03-8566

LINDA K. FLOWERS and
MARK WILCOX, COMMISSIONER OF
STATE LANDS, STATE OF ARKANSAS — DEFENDANTS

AFFIDAVIT

STATE OF ARKANSAS]
]
COUNTY OF PULASKI]

I, Patricia Lah, after being duly sworn, state on oath as follows:

I have been employed with the Commissioner of State Lands office since April 1999. My official title is Assistant to the Legal Counsel. I am familiar with the laws and procedures governing the sale of tax delinquent land and I have reviewed the documents related to the sale of the property which is the subject of this lawsuit. The records indicate the following:

1. Pulaski County parcel number 43L-215.00-188.00 (Lot 10 and S 20' of Lot 11, Success Addition to the City of Little Rock) was certified to the Commissioner of State Lands from Pulaski County for the nonpayment of real property taxes for the year 1997 on February 24, 2000. (Commissioner of State Lands Exhibit 1).

2. The parcel was certified in the name of Gary Kent Jones, 717 N. Bryan Street, Little Rock, AR 72205.

3. Following certification from the county, the Commissioner of State Lands sent by certified mail a letter, petition to redeem, and instructions, notifying Mr. Jones of the certification, his rights to redeem, and setting a public sale date of 4/17/2002. (Commissioner of State Lands Exhibit 2). The right to redeem property 30 days subsequent to public auction is clearly outlined in the instructions.

4. The entire notification packet was returned to the Commissioner of State Lands by certified mail return receipt requested and marked unclaimed. The return envelope indicates that the post office attempted delivery of the packet of 4-13, 3-19, and 4-29 of 2000. (Commissioner of State Lands Exhibit 3).

5. ~~Subsequent~~ Prior to the public sale date, the Commissioner of State Lands purchased a title report from Walker Title Abstract Company concerning the parcel (Commissioner of State Lands Exhibit 4). The title report listed Gary Kent Jones as owner at the date of forfeiture and that DF&A held unreleased liens on the parcel.

6. Notice of the sale by certified mail was sent to DF&A by letter, dated February 27, 2002. (Commissioner of

State Lands Exhibit 5). A green card indicating delivery to DF&A was returned to the Commissioner of State Lands. (Commissioner of State Lands Exhibit 6).

7. On April 1, 2002, a notice of the public sale was published in the Arkansas Democrat Gazette. (Commissioner of State Lands Exhibit 7). The notice contained sale date information and redemption information. The parcel appears as item 806 listed as Jones, Gary Kent, along with the legal description, lien information, minimum bid, and tax due amounts.

8. The parcel did not receive a bid at the public sale and did not sell.

9. By law, parcels not sold at public sale are subject to negotiated sale. On February 5, 2003, Linda K. Flowers submitted an Offer to Purchase the parcel to the Commissioner of State Lands. (Commissioner of State Lands Exhibit 8). Ms. Flowers offered to pay a total of $21,042.15, which included the taxes for the years 1997 through 2001, as well as the assessed value of $14,604.00.

10. Subsequent to receipt of the offer, the Commissioner of State Lands office performed negotiated sale research. (Commissioner of State Lands Exhibit 9).

11. On February 19, 2003, a notice of the pending negotiated sale was sent by certified mail to Gary Kent Jones at 717 N. Bryan Street, Little Rock, AR 72205. (Commissioner of State Lands Exhibit 10). The letter was returned, marked Unclaimed. (Commissioner of State Lands Exhibit 11).

12. On February 19, 2003, a notice of the pending negotiated sale was sent by certified mail to DF&A. (Commissioner of State Lands Exhibit 12). The letter was received. (Commissioner of State Lands Exhibit 13).

13. The taxes remained delinquent and unpaid.

14. Limited Warranty Deed Number 140635 was issued on May 28, 2003, to Linda K. Flowers. (Commissioner of State Lands Exhibit 14).

/s/ Patricia Lah
Patricia Lah

Subscribed and sworn to on November 25, 2003.

/s/ Lisa A. Pelton
Notary Public

My Commission Expires August 17, 2010

[Notary Seal Omitted In Printing]

State of Arkansas
Commissioner of State Lands

Mark Wilcox
Commissioner

Returned
Unclaimed

February 19, 2003

GARY JONES
717 N. BRYAN ST.
LITTLE ROCK, AR 72205

RE: Parcel # 43L-215.00-188.00, Code: 215-3 1997, Pulaski County, Arkansas
Description: LOT 10 & S20' OF LOT 11; LIEN-DF&A SUCCESS 22

Dear GARY JONES :

The parcel of property referenced above has been certified to the Commissioner of State Lands office for delinquent taxes pursuant to Act 626 of 1983, as amended. The tax records show that GARY KENT JONES is the owner of the above referenced parcel. Unless all taxes, penalties, interest and costs are paid to this office, a deed conveying title to a new owner will be issued on 3/21/2003.

If you have an interest in the property, in order to avoid its sale and additional costs, you should contact the Records Department of this office immediately for a petition to redeem, which will provide you with the total amount due. Please reference the code

number, parcel number or provide a copy of this letter when requesting a petition to redeem.

If you have sold this property, please refer this information to the new owner. If you have no interest in the property, please disregard this notice. We diligently attempt to notify all those persons who may have an interest, including those people with the same name as the owner of record, in hopes of reaching the correct owner of the property.

If you have any questions regarding this matter, please contact this office at 501-324-9222.

Sincerely,

/s/ Mark Wilcox

Mark Wilcox
Commissioner of State Lands

Commissioner of State Lands
CERTIFIED COPY

MW/BH:

EXHIBIT 10

State Capitol Building • Little Rock, Arkansas 72201
501-324-9222 • *FAX* 501-324-9421

ADDENDUM

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Answer (Appellee Flowers) ..... ADD 04

Answer (Appellee Wilcox) ..... ADD 06

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Answer to Counterclaim ..... ADD 13

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Answer to Requests for Admissions Propounded
to Mark Wilcox, Commissioner of State Lands ..... ADD 17

Amended Complaint ..... ADD 19

Answer to Amended Complaint (Appellee Wilcox) . ADD 20

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Supreme Court, U.S.
FILED
NOV 10 2005
OFFICE OF THE CLERK

(4)

No. 04-1477

IN THE

Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
Commissioner of State Lands,

Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR PETITIONER

MICHAEL T. KIRKPATRICK
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Washington, DC 20009
(202) 588-1000

November 2005 *Counsel for Petitioner*

QUESTION PRESENTED

When mailed notice of a tax sale or property forfeiture is returned undelivered, does due process require the government to take additional reasonable steps to locate the owner before taking the property?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Arkansas Supreme Court will be published in the S.W.3d reporter. The opinion is available at 2004 WL 2609800 and is reproduced in the appendix to the petition for a writ of certiorari (Pet. App.) at 1a. The Arkansas Supreme Court's unreported order denying rehearing is reproduced at Pet. App. 14a. The trial court's unreported order granting respondents' motions for summary judgment and denying petitioner's motion for summary judgment is reproduced at Pet. App. 12a.

JURISDICTION

The Arkansas Supreme Court entered its judgment on November 18, 2004 and denied a timely petition for rehearing on January 6, 2005. On March 23, 2005, Justice Thomas extended the time to file the petition for a writ of certiorari to May 6, 2005. The petition was filed on May 5, 2005 and granted on September 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

Petitioner Gary Kent Jones lost his house in a tax sale because he did not receive notice until it was too late to redeem the property. The State had sent two notices by certified mail to Mr. Jones at an address where he did not reside. Both letters were returned unclaimed. Although the State knew that its attempts to provide notice by certified mail had failed, and

although Mr. Jones's correct mailing address was readily available from a variety of sources, the State made no other effort to contact Mr. Jones before taking his property.

Once Mr. Jones learned that his house had been sold to respondent Linda K. Flowers, he brought this action against Ms. Flowers and the State, seeking to have the sale set aside because the State had failed to take reasonable steps to notify him of the tax sale and his right to redeem. The trial court granted summary judgment for the purchaser and the State, holding that the State had complied with the applicable statute and constitutional due process. The Arkansas Supreme Court affirmed, holding that even after the State learned that it had failed to notify Mr. Jones by mail, due process did not require that the State do anything more to try to provide effective notice before taking the property. As explained below, that holding cannot be reconciled with this Court's due process rulings and, therefore, should be reversed.

A. Factual Background

In 1967, Mr. Jones purchased a house located at 717 North Bryan Street in Little Rock, Arkansas, where he lived with his wife until they separated in 1993. Pet. App. 2a. Mr. Jones moved out of the house and into an apartment in Little Rock. Mrs. Jones continued to live in the house. *Id.* After the mortgage was paid off in 1997, the property taxes went unpaid. *Id.* Mr. Jones did not notify the property tax collector of his new mailing address, *id.*, but it was readily ascertainable from multiple sources, including the Little Rock phone book, the Pulaski County roll of registered voters, and the State income tax rolls. Joint Appendix (JA) 10.

The State certified Mr. Jones's property as delinquent for non-payment of taxes for 1997 and later years. Pet. App. 2a. In April 2000, the State mailed a certified letter to Mr. Jones at

the Bryan Street address in an attempt to notify him of the delinquency and his right to redeem the property by paying his back taxes. *Id.* The notice stated that, unless redeemed, the property would be subject to a public sale two years later, on April 17, 2002. *Id.* Because the notice was addressed to Mr. Jones alone and sent only to the Bryan Street address and not to his apartment, Mr. Jones did not receive it. The post office returned the notice to the State marked "unclaimed." *Id.*

Prior to the public sale date, the State purchased a title report to identify those with an interest in the property. The title report confirmed that Mr. Jones was the owner. JA 12. On April 1, 2002, a notice of the public sale was published in a newspaper. Pet. App. 2a.

No bids were made for Mr. Jones's house at the public sale. However, on February 5, 2003, respondent Flowers submitted a purchase offer to the State. *Id.* As part of its standard process for negotiated sales, the State visited the Bryan Street property and viewed the house, but it did not contact the occupants or post a notice of the pending sale. JA 13; Record (R) 110.

On February 19, 2003, the State sent a certified letter addressed solely to Mr. Jones at the Bryan Street address to attempt to notify him that his house would be sold if the taxes and penalties were not paid. Pet. App. 2a. Like the first letter sent by the State to Mr. Jones at the Bryan Street address, the second letter was returned to the State unclaimed. *Id.* Although the State knew that Mr. Jones had not received the two notices it sent by certified mail to the Bryan Street address, the State made no effort to determine Mr. Jones's correct mailing address, even though his current address could have been discovered with minimal effort.

On May 28, 2003, Ms. Flowers purchased the home for $21,042.15 through a negotiated sale.[1] Pet. App. 2a. Even then, Mr. Jones had a 30-day period in which he could have redeemed his property had he known that it had been sold. Ark. Code Ann. § 26-37-202(e). On July 2, 2003, shortly after the 30-day post-sale redemption period had passed, Ms. Flowers had an unlawful detainer notice delivered to the property. The notice was served on Cindy Edrington (the daughter of Mr. and Mrs. Jones) who contacted Mr. Jones, providing him his first actual notice of the tax sale. Pet. App. 2a-3a; JA 5; R 11.

B. Proceedings Below

Mr. Jones filed suit on July 28, 2003, alleging that the sale of his property was invalid because he did not receive constitutionally adequate notice of the tax sale or his right to redeem. Pet. App. 2a. Mr. Jones alleged that the State's failure to take reasonable steps to provide actual notice resulted in the taking of his property without due process. *Id.* at 3a. Ms. Flowers filed a counterclaim for unlawful detainer, and she moved for summary judgment, arguing that the two unclaimed letters sent by the State provided constitutionally sufficient notice to Mr. Jones.[2] *Id.* The State filed a similar motion for summary judgment, and Mr. Jones filed a cross motion for summary judgment. *Id.*

On January 14, 2004, the trial court granted summary judgment for Ms. Flowers and the State, denied Mr. Jones's

---

[1]The parties have stipulated that the fair market value of the property was about $80,000. R 224.

[2]After Ms. Flowers filed her counterclaim, Mr. Jones's estranged wife joined the suit as a plaintiff because she was living in the house. Pet. App. 3a.

motion for summary judgment, and granted Ms. Flowers's counterclaim for unlawful detainer. *Id.* The trial court found that the applicable tax sale statute, Ark. Code Ann. § 26-37-301, complied with constitutional requirements of due process and that Ms. Flowers was entitled to immediate possession of the property.[3] Pet App. 3a.

Mr. Jones appealed the trial court's order, and the case was certified to the Arkansas Supreme Court from the Arkansas Court of Appeals. Pet. App. 1a. The Arkansas Supreme Court affirmed the trial court's decision. It found that the State had complied with the statutory scheme for tax sales, Ark. Code Ann. § 26-37-301, and held that "the constitutional dictates of due process" do not require "that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed." Pet. App. at 6a. The court recognized that this Court has held that due process requires "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 7a (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Nevertheless, the court rejected Mr. Jones's argument that "it is unreasonable for the State not to attempt to locate a property owner's correct address" when the State knows that the original effort at notice has failed. *Id.* at 11a.

---

[3]The statute at issue, Ark. Code Ann. § 26-37-301, was amended effective January 1, 2004, to require personal service of process on the owner of a homestead, if the State fails to receive proof that the notice sent by certified mail was received by the owner. *See* 2003 Ark. Laws Act 1376. As the court below recognized, the amendment has no effect on this case. Pet. App. 9a-10a.

SUMMARY OF THE ARGUMENT

The decision below should be reversed because Mr. Jones was deprived of his property without due process of law. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" so that such parties may protect their interests. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In this case, the State *knew* that its initial effort to provide notice by certified mail had failed. Under the circumstances, a reasonable person actually desiring to provide notice would have searched available records for Mr. Jones's correct mailing address and would have contacted the occupants of the property. Such efforts would have resulted in effective notice to Mr. Jones without undue burden on the State because Mr. Jones's address was readily and inexpensively ascertainable from a variety of sources, including records maintained by the State. Because the State made no effort to attempt to provide actual notice to Mr. Jones following return of its mailed notices, the State violated the Fourteenth Amendment by failing to take reasonable steps to notify Mr. Jones of the imminent loss of his property.

ARGUMENT

WHERE THE GOVERNMENT KNOWS THAT ITS ATTEMPT TO PROVIDE NOTICE HAS FAILED, DUE PROCESS REQUIRES THAT IT TAKE FURTHER REASONABLE STEPS TO NOTIFY THE OWNER BEFORE TAKING THE PROPERTY.

In *Mullane*, this Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. The Court explained:

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . .

Id. at 315. This Court has "regularly turned to [*Mullane*] when confronted with questions regarding the adequacy of the method used to give notice," *Dusenbery v. United States*, 534 U.S. 161, 168 (2002), and "has adhered unwaiveringly to the principle announced in *Mullane*." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1983).

Petitioner recognizes that the *Mullane* due process standard does not invariably require *actual* notice before property interests may be extinguished. Determining what is reasonable "under all the circumstances" requires an inquiry into the efforts made by the State in attempting to effect notice, the likelihood that additional efforts would provide notice, and the burden of making additional efforts in light of the value and importance of the property interest at stake. Part A below shows that, under this Court's precedents, when mailed notice is returned undelivered, the State has a duty to take further reasonable steps to locate the addressee so that it can provide him with notice that the State proposes to deprive him of his property. Part B demonstrates that simple, inexpensive, and effective additional means of notifying Mr. Jones were readily available to the State, and that the property interest at issue—Mr. Jones's

$80,000 house—was one deserving of considerable due process protection. Finally, in Part C, petitioner explains that the State's conduct after return of the first mailed notice did not discharge its due process obligations.

A. The Return Of Mailed Notice Triggers A Duty To Take Further Reasonable Steps To Inform The Interested Party.

It may have been reasonable for the State first to attempt to notify Mr. Jones by certified mail sent to the Bryan Street address. However, the circumstances changed when the first certified letter was returned to the State unopened. Once the State knew that Mr. Jones had not received the certified letter, the State had an obligation to take further reasonable steps to attempt to provide effective notice.

In a series of cases beginning with *Mullane*, the Court has endorsed the use of mail as a means of providing notice where the interested party's name and address is known or can be determined through reasonable means. *Mullane* held that publication was a constitutionally inadequate means to provide notice to beneficiaries of a common trust whose identities and addresses were known to the trustee, but that mailed notice would constitute "a serious effort" to inform the beneficiaries of the proceeding. 339 U.S. at 318-19 (recognizing that mail is "an efficient and inexpensive means of communication").[4] In

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[4]Indeed, the Court has required mailed notice even where the number of interested parties was staggering and the individual property interests at stake relatively small. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974), the Court held in a class action maintained under Fed. R. Civ. P. 23(b)(3) that "[i]ndividual notice must be sent to all class members whose names and addresses may

(continued...)

Greene v. Lindsey, 456 U.S. 444, 453-54 (1982), the Court found that posting a notice of forcible entry and detainer proceedings on the subject premises did not satisfy due process under the circumstances and suggested that "the mails provide an 'efficient and inexpensive means of communication' . . . upon which prudent men will ordinarily rely in the conduct of important affairs." *Id.* at 455. In *Mennonite*, the Court concluded that if a mortgagee of property subject to a tax sale "is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." 462 U.S. at 798. *Mennonite* emphasized that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition" to the tax sale if the interested party's "name and address are reasonably ascertainable." *Id.* at 800. In *Mennonite*, the mortgagee's address was not on file, but the Court "assume[d] that the mortgagee's address could have been ascertained by reasonably diligent efforts." *Id.* at 798 n.4. Most recently, the Court upheld the adequacy of mailed notice where it was sent by certified mail and actually received at the institution where the interested party was incarcerated. *Dusenbery*, 534 U.S. at 164-65. Thus, notice by mail can satisfy due process where,

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[4](...continued)
be ascertained through reasonable effort," even though there were 2.25 million such individuals, most of whom held small claims. The Court's decision was based on the requirements of Fed. R. Civ. P. 23(c)(2), but the Court found that its conclusion was reinforced by the Advisory Committee's Note showing that the Rule incorporates the *Mullane* due process standard. *Eisen*, 417 U.S. at 173-175; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (where individual claims averaged only $100, due process required individual notice to each member of class).

under the circumstances, it is "reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315.

Here, however, the State knew that the mailed notices had not informed Mr. Jones of anything, because the letters were returned to the State unopened. In circumstances where the sender knows that an attempt to provide notice has failed, this Court has found the notice inadequate.

In *Robinson v. Hanrahan*, 409 U.S. 38 (1972), for instance, the State initiated proceedings to forfeit Mr. Robinson's car while he was in jail awaiting trial. Instead of mailing the forfeiture notice to the jail, the State mailed the notice to Mr. Robinson's home address. *Id.* at 38. As a result, Mr. Robinson did not receive the notice until after the proceeding was over. *Id.* at 39. The Court held that the State had failed to comply with *Mullane* because "the State knew that [Mr. Robinson] was not at the address to which the notice was mailed." *Id.* at 40. The Court found that "[u]nder these circumstances, it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise [Mr. Robinson] of the pendency of the forfeiture proceedings." *Id.*

Likewise, in *Covey v. Town of Somers*, 351 U.S. 141, 147 (1956), the Court held that where the government knew that its attempts to provide notice had been ineffective, those attempts could not satisfy due process. In *Covey*, notice of a tax sale was provided to the property owner by mail, posting, and publication. *Id.* at 144. Even though the notice was received, the Court found that it was constitutionally inadequate under the circumstances because town officials knew that the property owner was mentally incompetent and lacked the capacity to understand the notice. *Id.* at 147.

Robinson and *Covey* establish that where the government *knows* that it has failed to provide effective notice, due process

requires further reasonable steps to inform an interested party before taking the property. Thus, *Robinson* and *Covey* demonstrate that once the notice to Mr. Jones was returned to the State, the State had a duty to attempt to notify Mr. Jones by other reasonable means. The Fourth Circuit recently applied *Mullane*, *Robinson*, and *Covey* in a situation where mailed notice was returned undelivered and came to the same conclusion: "[W]hen prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient." *Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005).

B. The State Could Easily Have Provided Effective Notice To Mr. Jones.

Once the State's duty to take further reasonable steps to provide notice is triggered—as it was here—the question then is whether means were available to the State that would have been reasonably calculated to provide effective notice, and whether the burden of using such means is justified by the value of the property interest at stake. In this case, the undisputed facts demonstrate that the State could have easily provided effective notice to Mr. Jones, and given that Mr. Jones lost real property worth $80,000, the State cannot credibly argue that such means were not justified.

The State knew Mr. Jones was the owner of the property. JA 12. With very little effort, the State could have found Mr. Jones's correct mailing address after return of the notices sent to the Bryan Street address. Mr. Jones was not missing; he continued to live in the City of Little Rock, Pulaski County, Arkansas. JA 10. Mr. Jones's new address was listed in the then-current edition of the Little Rock telephone directory. *Id.*

The then-current Pulaski County voter registration rolls listed Mr. Jones at his new address. *Id.* Mr. Jones had used his new address when paying his state income taxes, and Mr. Jones had notified his long-time employer of his new mailing address. *Id.* In short, Mr. Jones was open about where he was staying, and anyone actually wanting to find Mr. Jones's correct address could have done so in minutes. Indeed, given the proliferation of Internet search engines and on-line directories, the State could have located Mr. Jones's correct address with just a few keystrokes. Alternatively, the State could have sought a current address through a credit bureau, the State's own driver's license and automobile registration records, or from utility companies. The State cannot credibly claim that use of such methods would have imposed an unreasonable burden, especially where Mr. Jones's correct address appeared in the State's own records.

After a notice letter is returned undelivered, "[w]hat additional efforts are reasonable will depend on the circumstances of the particular case." *United States v. Ritchie*, 342 F.3d 903, 911 (9th Cir. 2003). Thus, it is not possible to draft a definitive list of the means that must be employed in any given situation. However, many courts have suggested that the telephone directory and Internet searches that the State could have used to find Mr. Jones would have been useful to satisfy due process under similar circumstances. *See, e.g., Karkoukli's, Inc. v. Dohany*, 409 F.3d 279, 285 (6th Cir. 2005) (due process satisfied where, after return of mailed notice, government made significant efforts to ascertain a valid address by searching the phone book and the Internet); *Plemons*, 396 F.3d at 577 ("[C]hecking the local telephone directory may be reasonable in a given situation."); *Small v. United States*, 136 F.3d 1334, 1338 n.3 (D.C. Cir. 1998) (suggesting that, before giving up after the return of mailed notice, a reasonable person would try other ways of locating an interested party, such as

checking telephone listings); *United States v. Rodgers*, 108 F.3d 1247, 1252 (10th Cir. 1997) (telephone and utility company listings are among the sources the government can consider in determining where to send notice after initial mailing is returned undelivered); *United States v. 125.2 Acres of Land*, 732 F.2d 239, 242 (1st Cir. 1984) (due process not satisfied where "[p]ossessed of knowledge of [land owner's] name and town, and with access via the telephone book to his street address, the government could easily have notified him of the court proceeding by mail or other direct means"); *Montgomery v. Beneficial Consumer Disc. Co.*, No. 04-2114, 2005 WL 497776, at *6 (E.D. Pa. Mar. 2, 2005) (due process satisfied where settlement notice was sent to each class member's last known address and, where mail was returned undelivered, an Internet search was conducted and notice sent again). Similarly, many courts have required that the party charged with notice must at least examine governmental records that could provide current information, such as the state and county records that would have revealed Mr. Jones's correct address had they been checked in this case. *See, e.g., Plemons*, 396 F.3d at 578 (reasonable diligence required search of "all publicly available county records"); *Foehl v. United States*, 238 F.3d 474, 480 (3d Cir. 2001) (after return of mailed notice, government should have obtained correct address from "obvious sources" including the driver's license bureau); *Rodgers*, 108 F.3d at 1252 (due process required that government search its own records after mailed notice was returned).

In addition, the State could have provided notice to Mr. Jones by contacting the occupants of the house, either in person or by mail, or by posting a notice at the property. Such steps would not have been unduly burdensome. Either effort would have resulted in actual notice to Mr. Jones, as the facts of this case show. In the end, it was the unlawful detainer notice left

at the property that provided Mr. Jones his first actual notice of the sale of his house. Pet. App. 2a-3a; JA 5; R 11. Moreover, State personnel visited the property to perform negotiated sale research. JA 13; R 110. Dropping off a letter or posting a notice at that time would have been simple to do.

The Court has recognized that notice to the occupants or caretakers of real property can be an effective means of providing notice to the owner. *Mullane*, 339 U.S. at 316. In this case, Mrs. Jones was an occupant. Pet. App. 2a. Although she was not the record owner, she had lived in the Bryan Street house for nearly forty years. Thus, Mrs. Jones—not wanting to have to find another place to live—would have had a strong incentive to convey to Mr. Jones any notice indicating that the property was about to be lost. Mrs. Jones's interest in avoiding the forfeiture of her home belies respondents' suggestion that it was her "deliberate ignorance, or steadfast indifference" that led to the loss of the property. Respondents' Brief in Opposition to the Petition (BIO) at 14. Mrs. Jones should not be blamed for not claiming the certified letters. Nothing in the record suggests that Mrs. Jones had any knowledge of the contents of the letters or even who they were from. The letters were not addressed to Mrs. Jones. Rather, they were addressed solely to someone who had moved from the property seven years earlier and whose current address was readily ascertainable to anyone who desired to find it.

C. The State Did Not Fulfill Its Constitutional Duty, And Whether Mr. Jones Could Have Better Protected His Interest Is Irrelevant.

Although the argument was not made in the courts below, respondents asserted for the first time in their brief in opposition that the State, after the first mailed notice came back "unclaimed," had tried to find Mr. Jones by purchasing a title

report and conducting "negotiated sales research." BIO 12-13. Nothing in the record suggests that these efforts were part of an attempt to locate and then notify Mr. Jones. To the contrary, neither step was intended to ascertain Mr. Jones's correct mailing address after the State learned that its attempts to provide notice by mail had failed. First, the title search was designed to reveal changes in ownership or the existence of any liens against the property, but not to ascertain Mr. Jones's correct address. R 103. Indeed, nothing in the record suggests that the title company that prepared the report looked for Mr. Jones's address in any records other than those pertaining to the Bryan Street property. Second, the "negotiated sales research" involved a viewing of the Bryan Street address to verify that the property still existed as described in the deed records and to provide a description of the house and immediate vicinity, but it was not in any way calculated to discover Mr. Jones's correct address or to provide notice to Mr. Jones through the occupants. R 110. Thus, the title search and negotiated sales research did not fulfill the State's obligation to take reasonable steps to notify Mr. Jones.

Likewise, the publication of a tax sale notice in the newspaper was insufficient to satisfy due process. Publication is a means of providing constructive notice, and constructive notice satisfies due process only "where it is not reasonably possible or practicable to give more adequate warning." *Mullane*, 339 U.S. at 317; *accord Mennonite*, 462 U.S. at 798 & n.4 (constructive notice does not satisfy *Mullane* if the interested party's address "could have been ascertained by reasonably diligent efforts"); *Robinson*, 409 U.S. at 40 ("[N]otice by publication is not sufficient with respect to an individual whose name and address are known or easily ascertainable."); *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962) (same). In this case, because Mr. Jones's correct

address was readily available with almost no burden on the State, constructive notice by publication was insufficient.

Finally, in concluding that due process requires no further effort to locate the correct address of an interested party after the initial notice is returned, the court below erred by relying on an Arkansas statute that obligates a property owner to notify the tax collector of any change of address. Pet App. 10a (citing Ark. Code Ann. § 26-35-705). This Court has held that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide effective notice. *Mennonite*, 462 U.S. at 799. Thus, the State's failure to provide adequate notice to Mr. Jones cannot be excused by reference to a state law that purports to shift the burden to the taxpayer.

CONCLUSION

Because the State failed to provide Mr. Jones constitutionally adequate notice before taking his house, the decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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In The
Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS, AND MARK WILCOX, COMMISSIONER OF STATE LANDS,

Respondents.

On Writ Of Certiorari To The Arkansas Supreme Court

BRIEF FOR RESPONDENT LINDA K. FLOWERS

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QUESTION PRESENTED

After constructive notice and multiple attempts at actual mailed notice of a tax sale date or right to redeem real property are returned unclaimed after being mailed to the last known address of the taxpayer, does Due Process require the government to take heroic additional steps to locate an owner, above and beyond statutory requirements, when the taxpayer has never complied with nor challenged the statute at issue?

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STATEMENT OF THE CASE

On February 24, 2000, Petitioner Gary K. Jones and his wife, Jean, forfeit to the State of Arkansas, their real property at 717 N. Bryan Street, in Little Rock, Pulaski County, Arkansas for their failure to pay real property taxes in 1997, 1998, 1999, (and all subsequent years). Joint Appendix ("JA") at 12. The Pulaski County Collector ("Collector"), certified this forfeiture to Respondent Commissioner of State Lands, which forfeiture occurred by operation of state law, Ark. Code. Ann. Sec. 26-37-101 (1997 Supp.). Record ("R.") 96 (Exhibit 1 to Affidavit of Patricia Lah). Title to the property vested with the State of Arkansas on February 24, 2000, in care of the Commissioner of State Lands, who is charged with collection of the past due taxes, and sale of the real property.

Prior to the Collector's certification of forfeiture to Respondent Commissioner of State Lands, the Collector published on January 18, 2000, in the state-wide daily newspaper, the Arkansas Democrat-Gazette, redemption information, with a notice that property not redeemed timely would be forfeit to the State in accordance with Ark. Code Ann. Sec. 26-37-102. R. 96. The Collector also caused the Jones property to be included in a list of delinquent lands, and entered in a permanent record, appropriately labeled, open to inspection by the public, and further stating what newspaper the notice of delinquent land was published and the dates of publication in accordance with Ark. Code Ann. Sec. 26-37-106. R. 96.

Additionally, prior to certification to the Commissioner of State Lands, the Pulaski County Assessor ("Assessor") verified the assessment of taxes for the 1997 tax year, and further verified the name and last known address of the

owner of record, Gary K. Jones, in accordance with Ark. Code. Ann. Sec. 26-37-103. R. 96.

Finally, prior to the forfeiture in February of 2000, the Pulaski County Clerk and Recorder ("Recorder") certified that the Assessor had recorded the list of parcels assessed for taxation as real property. R. 96. This record is evidence of the facts contained in the list and certificate in accordance with Ark. Code Ann. Sec. 26-37-106, and was appropriately certified and made part of the record in the trial court. R. 96.

Petitioner Jones did not challenge at any point the February 24, 2000, forfeiture of the real property to the State of Arkansas by operation of law. Jones challenged only notice of opportunity to redeem the land.

In order to carry out his statutory and state constitutional duties to collect past due taxes, or to sell forfeit lands, Respondent Commissioner of State Lands notified Mr. Jones of Jones' right to redeem the property from the State of Arkansas. In March of 2000, Defendant Commissioner provided appropriate written notice of the right to redeem, a proposed Petition to Redeem, and instructions, by certified mail, to Petitioner Jones. JA 12. This notice told of the potential sale of the real property at public auction on or about April 17, 2002, two years in advance, in accordance with the statutory scheme. R. 99-101.

The March 2000 notice was mailed to the real property address, 717 North Bryan, Little Rock, which is the subject of the Petition. R. 102. Mrs. Jean Jones continued to live at this address through the hearing date in 2004. R. 29; Jones' Addendum to Arkansas Supreme Court Brief at 33 ("Jones Add."); R. 46 (Mrs. Jones' Affidavit). The 717 North Bryan address was also the notification address of

record as certified to the Land Commissioner by the Pulaski County Assessor. R. 96.

After three attempted deliveries, the March 2000, certified mail notice was returned "unclaimed" to the Commissioner. JA 12; R. 102. There was no indication on the face of the letter that a forwarding order for Mr. Jones had expired with the post office. *Id.* There was no indication on the face of the letter that it was undeliverable. *Id.*

Neither Mr. Jones, nor his wife, had notified any appropriate County or State taxing authorities or taxing entities that either of them had a new mailing address.

After the first certified mail notice was returned to the Commissioner of State Lands unclaimed, on February 14, 2002, the Commissioner purchased a title report, which showed Gary K. Jones as the record owner prior to forfeiture. JA 12; R. 103. The title report also showed no change in record ownership information since the February 24, 2000, forfeiture of the real property to the State of Arkansas. *Id.*

On April 1, 2002, the Commissioner published notice of Jones' right to redeem, the sale date, and other information, in a newspaper of general circulation in Pulaski County. JA 13; R. 106, 108. No purchasers came forward at the April 2002 auction, and the property became subject to a negotiated sale by operation of law, which law Jones does not challenge. JA 13.

Respondent Linda Flowers made a purchase offer in February, 2003. JA 13, R. 109. The Commissioner subsequently conducted additional research into the property. JA 13; R. 110. The negotiated sales research indicated that the real property existed as described, had the proper legal and street addresses, showed that title records indicated

Gary Jones remained as the most recent owner prior to forfeiture, had not transferred or attempted to transfer title, and finally that notice information should continue to be sent to Mr. Jones at the property address, 717 N. Bryan Street. *Id.* The Negotiated Sales Research also indicated that "the property does appear to be vacant." R. 100.

As Mr. Jones said in his Brief to the Arkansas Supreme Court, "the State actually conducted extensive pre-sale research on the Joneses' property." Jones' opening Brief and Addendum to Arkansas Supreme Court, at 9.

Respondent Land Commissioner subsequently mailed, by certified mail, notice of the pending negotiated sale to Mr. Jones at his last known address, and his address of record, the property address where Mrs. Jones lived, 717 N. Bryan. JA 13; R. 111-112. After three attempts at delivery, on February 20, March 12, and March 17, 2003, this notice was also returned unclaimed. JA 13; R. 112. There was no indication on the face of the letter that a forwarding order for Mr. Jones had expired with the post office. *Id.* There was no indication on the face of the letter that it as undeliverable. *Id.*

The Commissioner approved Flowers' offer to purchase the property at 717 N. Bryan, on April 11, 2003. R. 109. The Arkansas Attorney General, Mike Beebe, subsequently approved Flowers' offer to purchase the property at 717 N. Bryan on April 23, 2003. *Id.* Flowers purchased the property, and the Commissioner issued a Limited Warranty Deed for Forfeited Property Sold on May 28, 2003. JA 14; R. 115.

Flowers subsequently moved to evict any occupants, by notice delivered to the property address by a process server. R. 11. Mr. Jones promptly received that notice, as he admitted in his complaint, and within days, sued to

have the sale and deed set aside solely for Land Commissioner's failure to give Jones "actual notice" of the proposed sale and right to redeem. R. 1. Jones did not state, specify, or assert a general challenge to the statutory scheme. R. 1. Flowers counterclaimed. R. 8. Mr. Jones then amended his pleadings, by adding Mrs. Jean L. Jones, his wife, as an additional Plaintiff, but without changing his legal claims that the constitution required Land Commissioner to provide the plaintiffs "actual notice" of the sale and right to redeem. R. 19. Mr. and Mrs. Jones again did not attack the statutory scheme as a whole in their Amended Complaint. *Id.*

In order to avail himself of certain legal arguments and putative statutory protections (R. 31), Petitioner Jones has systematically claimed, in this litigation and on appeal, that the real property at issue is his "homestead," i.e., the place where he lived. R. 1 ("his home"); R. 26 ("homestead assertion"); R. 27 (argument concerning their "homestead"); R. 28 (Jones' October 15, 2003, Affidavit stating it is "homestead" and "my homestead" with no indication that Mr. Jones did not live on the real property); R. 29 (Mrs. Jones' Affidavit concerning "our homestead"). It was not until November 24, 2003, that Mr. Jones first made his contrary assertion in the proceedings below, that is, that he did not live at 717 N. Bryan Street. JA 9-10. Mr. Jones did not amend his pleadings in any way to reflect this change. JA 1-2 (summary of docket entries).

It is not now disputed, and has not been disputed, that Jones failed to file with the Pulaski County Recorder (and Clerk), the Pulaski County Assessor, and the Pulaski County Treasurer, any notice of a change in his mailing address for notices of taxes due on the real property. The notices at issue were mailed to Mr. Jones' last known address (717 N. Bryan). Mrs. Jean Jones continued to live

in the home on N. Bryan Street, through the hearing date in the trial court, which is also the same location where Respondent Commissioner repeatedly mailed the notices at issue herein. R. 46. It was not disputed that Mrs. Jean Jones was at all times relevant to this case, the wife of Petitioner Gary K. Jones.

The trial court granted summary judgment to Flowers and the Commissioner, confirming the sale, and denied Jones' motion for summary judgment, dismissing the case.

Mr. Jones subsequently admitted, on appeal to the Arkansas Supreme Court, that "actual notice" of the sale date and opportunity to redeem was not required after all. Jones' opening Brief and Addendum to Arkansas Supreme Court, at 13. The Arkansas Supreme Court unanimously affirmed, without oral argument, stating, *inter alia*, that Jones, in the trial court, ignored an applicable statute that required the property owner to notify the tax collector of his correct address. Pet. App. 10a. Rehearing in the Arkansas Supreme Court was denied, in a one-line Order, without argument.

SUMMARY OF THE ARGUMENT

The decision below should be affirmed, and this appeal dismissed, because Mr. Jones failed to satisfy Arkansas' long held rules governing preservation of issues for appeal. An appellant must bring to the Arkansas Supreme Court an argument raised and fully developed in the trial court, in order to preserve it for appeal. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567, 571 (2003). If a particular theory was not presented to the trial court, the

theory will not be reached on appeal. *Id.* (*citing*, *Ouachita Wilderness Institute v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997)). This Court should assume that the Arkansas Court did not rule on the issue for want of proper presentation to the state court. *Webb v. Webb*, 451 U.S. 494, 495 (1981) (citations omitted).

Here, Mr. Jones has failed to present his challenge properly to the Arkansas Court. It is undisputed that Mr. Jones did not raise any challenge to Ark. Code Ann. Sec. 26-35-705 in the trial court below; nor did he respond in any way to arguments timely made by Respondent Flowers and Respondent Commissioner in the trial court. Section 26-35-705 provides that the taxpayer, Jones, has an obligation to furnish the correct address to the taxing authorities in the event that the taxpayer changes address. Jones did not draw into question the constitutionality of Section 26-35-705, and consequently cannot prevail now.

ARGUMENT

I. PETITIONER HAS NOT PROPERLY PRESERVED FOR APPEAL THE ISSUES RAISED IN HIS PETITION.

The question presented is whether Due Process requires heroic additional steps to locate Mr. Jones when he failed to make a predicate challenge to the applicable statute in the trial court below. It is not enough to draw a statute into question by disputing an act done – or not done – by virtue of such statute. *See, Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210, 224-26 (1889). Jones had to fully develop his arguments in both the trial court and the Arkansas Supreme Court. This he has not done.

With very rare exceptions, the Supreme Court should not consider a petitioner's federal claim unless it was either expressly addressed by, or properly presented to, the state court that rendered the decision. *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) (citations omitted). It is not disputed that Mr. Jones did not challenge Arkansas Code Ann. Section 26-35-705 in the trial court. His failure to challenge that statute, or to obtain any ruling as to the constitutionality of that statute, precludes further review in this Court. Jones' jurisdictional statement to the Arkansas Supreme Court makes no mention of the arguments he now makes to this Court. Joneses opening Brief and Addendum to Arkansas Supreme Court, at v (Jurisdictional Statement).

Arkansas Code Annotated Section 26-35-705 provides as follows:

> No later than July 1 of each year, the sheriff or collector shall be required to mail statements of taxes due by any taxpayer to the address provided by the taxpayer. In the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address.

Ark. Code Ann. Sec. 26-35-705 (1997). In short, this statute imposes upon a taxpayer a duty to safeguard his interests by ensuring that the taxing authorities have a valid mailing address. It is also part of a much larger statutory scheme.

A challenge to Section 26-35-705 is a predicate to making a successful Due Process challenge for lack of adequate notice of a right to redeem real property from the Commissioner for State Lands. In a series of cases, the Arkansas Supreme Court cited Section 26-35-705 in

turning back numerous Due Process challenges alleging inadequate constructive notice of sale of real property previously forfeit to the State of Arkansas. *See, Tsann Kuen Enterps. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003). Petitioner Jones, although apparently aware of these cases, failed to challenge Ark. Code Ann. Sec. 26-35-705 in the trial court because such a challenge was contrary to his other arguments.

In the courts below, Jones argued, repeatedly, and unsuccessfully, that his interest in the real property was a "homestead" interest of a resident homeowner. Consequently, Jones claimed below, he was entitled in 2003 to the protections of a revised statute that went into effect on January 1, 2004, for the protection of homestead interests in real property, Ark. Code Ann. Sec. 26-37-301 (2003) (amendment effective January 1, 2004). The amendment requires the Commissioner of State Lands to provide actual notice to owners of a homestead (and no others) by personal service of process at least sixty (60) days before the proposed sale. Petitioner Jones has abandoned this argument in this Court.

Jones further argued in the courts below, as his Complaint and Amended Complaint state, that his sole line of attack was that "actual" notice had to be provided to him as the homestead owner. It was not until Mr. Jones' receipt of the Land Commissioner's November 17, 2003, Supplemental Brief in Support of Commissioner's Motion for Summary Judgment, citing to *Dusenbery v. United States*, 534 U.S. 161 (2002), R. 32, that Jones changed his briefing, his argument, and his affidavit. Jones changed his assertions to state, for the first time, that he had not lived in the real property since 1993. JA 9-10.

Notwithstanding the sudden change in his affidavit and argument to the trial court, Petitioner Jones failed to amend his pleadings accordingly, although he had every right, and every opportunity, to do so. Ark. R. Civ. P. 15(a) ("party may amend his pleadings at any time without leave of court").

Within a very short time after Mr. Jones' new revelation that he had not lived at 717 N. Bryan since 1993, Respondents Flowers, on December 3, 2003, and Land Commissioner on December 9, 2003, promptly asserted that Mr. Jones had a statutory duty to notify the taxing authorities of his purported change of address, pursuant to Ark. Code Ann. Sec. 26-35-705. R. 81 (Flowers); R. 90 (Wilcox, Commissioner). In his only response to these legal arguments, Mr. Jones raised a challenge to another part of the statute (Section 26-37-202(e)), but failed to address the issue of Section 26-35-705 in the trial court. R. 135-138.

Moreover, Jones did not argue in the trial court that Respondent Commissioner had additional obligations to search telephone books, voter registration, and income tax records, notwithstanding Jones' failure to follow the law and protect his interests by filing a simple change of address notice. Consequently, on January 14, 2004, the trial court made its ruling, without any argument from Mr. Jones whatsoever concerning Section 26-35-705, without ruling on the applicability or constitutionality of Section 26-35-705, and without deciding the question presented by Petitioner in his appeal here. Pet. App. 12a.

The Arkansas Supreme Court noted that Jones had failed to make a predicate challenge to the applicable statute at issue, when it stated:

> The Joneses argue that the Commissioner should be required to search the public records or the phone book in order to ascertain the property owner's correct address. Again, this argument ignores the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address.

Pet. App. 10a. In other words, the Arkansas Supreme Court did not pass on the constitutionality of 26-35-705 because Jones failed to challenge that Section in the trial court. Jones' failure is otherwise inexplicable, given the series of Arkansas Supreme Court cases, over a period of years, indicating that 26-35-705 was of primary importance in its previous decisions.

This Court should assume that the Arkansas Supreme Court's failure to pass on this question was due to want of proper presentation by Mr. Jones in the state trial court. *Street v. New York*, 394 U.S. 576, 582 (1969); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Petitioner Jones has done nothing to show the contrary.

The Arkansas Supreme Court did not address the merits of an argument that Section 26-35-705 is unconstitutional for imposing an obligation on the taxpayer to notify the taxing authorities of a new address, because the trial court did not rule on the issue. Jones first raised this challenge, albeit obliquely, in his Brief to the Arkansas Supreme Court. Joneses opening Brief and Addendum to Arkansas Supreme Court, at 10. Mr. Jones' failure to obtain such a ruling in the trial court was a procedural bar to consideration of those issues, and constitutional issues related thereto, in the Arkansas Supreme Court. *Bell v. Bershers*, 351 Ark. 260, 92 S.W.3d 32, 37-38 (2002) (citing cases).

Mr. Jones' constitutional arguments concerning this statute had to be raised and fully developed in the trial court. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567, 571 (2003). Development of a challenge to Section 26-35-705 was required in order to provide a record sufficient to demonstrate error of a federal constitutional dimension on appeal. *Tsann Kuen Enterps. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003). It is too late for Mr. Jones to argue that Due Process required Respondent Land Commissioner to provide more notices, or to undertake more research of phone, voter registration, and income tax records, above and beyond requirements of a statute Jones did not follow and did not challenge in any way in the trial court.

The Arkansas procedural rules, above, forbid the raising of federal questions at late stages in a case, and by any means other than presenting the issues to the trial court, making a complete record, and obtaining a ruling in the trial court in the first instance. These procedural rules are valid exercises of state power. *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955); *Wainwright v. Sykes*, 433 U.S. 72, 81-87 (1977).

The Arkansas Supreme Court's long-held insistence on this procedural bar serves a legitimate state interest in having the trial court decide, in the first instance, all of the issues to be raised on appeal. It is important that the Arkansas trial court be given the first opportunity to consider the applicability of Section 26-35-705 in light of federal constitutional challenges, since the trial court might have construed the statute, as applied to the facts, in a way which saves its constitutionality. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). This is particularly so

where Mr. Jones revised the facts of his case, contradicted his own affidavit, and revised substantially the legal bases for his arguments, so many times.

This Court's only power over the Arkansas Supreme Court judgment is to correct it to the extent that it incorrectly adjudged federal rights properly presented, but not to revise the Arkansas Court's opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Given the independent and adequate basis in state procedural rules that form the basis of the decision below, it is fair to say that the Arkansas Supreme Court could and would make the same judgment, albeit with a slightly different written opinion, after any "correction" urged by Petitioner Jones. Consequently, this Court's decision would be nothing more than an advisory opinion. *Id.*; *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 101-102 (1973). This Court should not exercise its powers in this case.

Petitioner's failure to raise the constitutionality of Section 26-35-705 in the trial court is also highly prejudicial to Respondents. As a consequence of Jones' failure, the record below is inadequate to address the factual and legal issues surrounding the application of Section 26-35-705 to the facts of this case, as Jones now construes them. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Jones' failure is particularly prejudicial to Respondents where the applicable constitutional "rule" is a rule of reasonableness under all the circumstances. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It is impossible to argue the adequacy of Respondent Land Commissioner's actions – or proported failures to act – when Jones failed to develop a sufficient record on the matter at trial below.

Jones' failure to address Section 26-35-705 precluded Respondents from clarifying any factual ambiguities, including any ambiguities or uncertainties in the Lah Affidavit, JA 11-14, which could have been corrected in the trial court. Respondents may have been better able to flesh out the meaning, import, context, and extent of the "extensive pre-sale research on the Joneses' property" which Jones admitted in his opening Brief and Addendum to Arkansas Supreme Court, at 9. Respondents might also have better presented an explication of the handwritten notations on Exhibit 9 to the Lah Affidavit, which indicated next to the "notice information" to "send 1 cert. 1 reg. mail." R.75. Respondents might also have been able to present to the trial court the nature of the complex and expensive task it would be to locate the correct "Gary Jones" in the Little Rock telephone directory.

The Arkansas Supreme Court treats every act of the Arkansas legislature with a strong presumption of constitutionality. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001). The burden is on Jones to prove the unconstitutionality of a state statute. *Id.* Petitioner's failure to challenge Section 26-35-705 in the trial court is his waiver of any challenge to that statute on appeal.

Likewise, Jones' failure to challenge Section 26-35-705 precludes his argument that his "ability" to take steps to safeguard his interests does not relieve the state of its obligations to provide Due Process. Petitioner's Brief at 16. Contrary to Petitioner's assertions, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 793 n.2 (1983), does not decide this issue, but left the question open. Section 26-35-705 does not simply provide Jones with the "ability to take steps to safeguard" his interests. Section 26-35-705 requires

Jones to take steps to protect himself, as part of the statutory scheme, and in order to qualify for the protections of the statute. *Mennonite* said nothing about such a statutory requirement. 462 U.S. at 793 n.2. There is no discussion of this in the proceedings below precisely because Mr. Jones failed to raise and develop this issue.

The constitutionality of Section 26-35-705 was not an issue at all in the trial court and was not once explicitly cited by Petitioner in his three briefs to the Arkansas Supreme Court. Accordingly, the issue of the constitutionality of Sec. 26-35-705 is not preserved for review in the United States Supreme Court because it was not preserved for review in the Arkansas Supreme Court. *Bell v. Bershers*, 351 Ark. 260, 92 S.W.3d 32, 37-38 (2002) (citing cases); Pet. App. 4a. The consequence is that there is an independent and adequate basis in state law to decide the issue, which this Court should not overturn.

RESPONDENT COMMISSIONER OF STATE LANDS

Respondent Flowers further agrees with the Brief to be submitted by Respondent Wilcox, Commissioner of State Lands for the State of Arkansas.

CONCLUSION

Because Mr. Jones failed to make a predicate challenge to Ark. Code Ann. Section 26-35-705 in the trial court, the writ of certiorari was improvidently granted; the writ of certiorari should be withdrawn; Jones should be

denied any of the relief he seeks; and the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS AND MARK WILCOX,
COMMISSIONER OF STATE LANDS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires a State to take additional measures to locate an alternative address for a real property owner who has failed to pay taxes for four years where the State has twice sent notice by certified mail to the property owner's last known address, enacted a statutory requirement that a real property owner keep the tax collector apprised of any change in address, and provided notice by publication in a local newspaper after the mailed notices were returned unclaimed.

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STATUTORY PROVISION INVOLVED

In addition to the Fourteenth Amendment of the United States Constitution cited by petitioner, this case involves § 26-37-301 of the Arkansas Code Annotated, set forth in Addendum A to this brief, and § 26-35-705 of the Arkansas Code Annotated which provides in pertinent part:

> In the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address.

INTRODUCTION

In 1967, petitioner Gary Kent Jones ("Jones") purchased real property located at 717 North Bryan Street, in Little Rock, Arkansas. He lived there with his wife until 1993, when he moved into an apartment; his wife continued to live at 717 North Bryan Street. Jones continued to pay real property taxes on that property through 1996, but failed to remit taxes for the years 1997, 1998, 1999, and 2000.

Pursuant to Arkansas law, when Jones moved, he had an "obligation to furnish the correct address" so that the tax collector could notify Jones of the taxes due on his property. Ark. Code Ann. § 26-35-705. Jones failed to do so. As a result, the Commissioner of State Lands ("Commissioner") notified Jones by certified mail at the address of the property (where Jones' wife continued to reside) that he was delinquent and had a right to redeem the property. That notice and a subsequent notice via certified mail were returned as "unclaimed." The Commissioner followed up these mailings with a notice of public sale published in the local newspaper. The question presented here is whether these actions – the provision of notice by certified mail, the enactment of a legal requirement obligating a taxpayer who changes his or her address to provide the tax collector with the correct address, and a follow-up notification by publication – satisfy the requirements of due process prior to

the sale of property for failure to pay real property taxes over a number of years.

Arkansas' statutory notice regime satisfies due process. Due process does not require that a real property owner receive actual notice before he or she loses that property for failure to pay taxes. *Dusenbery* v. *United States*, 534 U.S. 161 (2003). It requires only "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In numerous cases, this Court has made clear that regular mail is a constitutionally adequate means of delivering notice to persons whose addresses are known. See *infra* at 14. Arkansas' law requires notice by certified mail, exceeding that minimum requirement. In addition, Arkansas seeks to ensure the reliability of its mailed notices by imposing a specific legal obligation to notify the tax collector of any change in address for purposes of tax collection. This is clearly a scheme "reasonably calculated" to provide notice of a potential deprivation.

Jones, however, is dissatisfied with Arkansas' provision only of notice reasonably calculated to apprise parties of a deprivation. Instead, Jones argues that the State must assume additional duties to ascertain the property owner's address if the letter is not claimed. He couches the issue in terms of the Commissioner *knowing that the notice was not mailed to the property owner's address*. That precise question, however, is not presented here because all that the Commissioner knew was that the mail was "unclaimed," and all that means is that the residents of the property chose not to come to the post office to claim the registered mail sent to the address on file as Jones' place of residence. The Commissioner did not know that Jones had moved.

In any event, this Court has not and should not constitutionalize a requirement that constitutionally-

reasonable notice be followed by additional measures if the government learns information that casts doubt on whether actual notice was received. This would place a substantial burden on tax collection agencies which receive thousands or tens of thousands of returned mailings every year. Tax collection is a matter of fundamental significance to the State. Indeed, "the power to tax is basic to the power of the State to exist," and "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation." *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 826 (1997) (citing *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). Its costs would increase exponentially, and it would be both be delayed and impaired under Jones' proposed construction of the Due Process Clause.

Further, Jones' expansive conception of due process would involve this Court in formulating and micromanaging State governments' policies respecting the extent of the follow-up required for mailed notices "reasonably calculated" to apprise property owners of a deprivation, but returned as undeliverable for any number of reasons.

Finally, even if the Due Process Clause requires States to take follow-up measures after learning that an initial constitutional notice may not have been received, the follow-up measures that the State mandates were plainly sufficient in this setting. The Commissioner published notice of the sale in the local newspaper. To be sure, publication is no longer constitutionally sufficient by itself to satisfy due process, but it is an acceptable follow up measure, particularly where, as here, the property owner has failed to pay *any* real property taxes for many years. "The owner of property whose taxes, duly assessed, have remained unpaid for more than one year must be held to the knowledge that proceedings for sale are liable to be begun." *Longyear* v. *Tollan*, 209 U.S. 414, 418 (1908).

STATEMENT OF THE CASE

1. As noted, petitioner Jones purchased property located at 717 North Bryan Street, Little Rock, Arkansas, 72205, in 1967. Joint Appendix ("JA") 9. Jones lived there with his wife until 1993 when he and his wife separated, and he moved into an apartment. *Id.* at 10. His wife remained in the home.[1] Although he claimed in state court that the property is his homestead, Jones has not lived at 717 North Bryan Street since 1993.[2] *Id.* at 9-10; Pet. App. 2a. And, although he had a legal obligation to do so, see Ark. Code Ann. § 26-35-705, Jones failed to inform the Pulaski County Collector of his new address. In 1997, Jones stopped paying taxes on the property; he did not pay any taxes on the Bryan Street property for 1997, 1998, 1999, and 2000. Pet. App. 2a.

Three years later, in early 2000, Pulaski County certified that the property was delinquent in its taxes to respondent Commissioner of State Lands, State of Arkansas. JA 12.[3] In early 2000, pursuant to Arkansas law, see Ark. Code Ann. § 26-37-301, the Commissioner sent Jones a Petition to Redeem addressed to the North Bryan Street property. JA 12. The certified mailing contained notice of the delinquency, instructions for redemption, and information regarding the

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[1] Although Jones and his wife separated, they did not divorce during the time relevant to this case. And, at all times relevant here, Mrs. Jones resided at the property. Nothing in the record indicates that Mrs. Jones is, or ever has been, an owner of the property.

[2] Arkansas defines "homestead" as a "dwelling that is used as [a person's] principal place of residence." Ark. Code Ann. § 26-26-1122(a); *see also Black's Law Dictionary* 660 (5th ed. 1979). Jones admits that he has not lived at 717 Bryan Street since 1993. JA 9-10.

[3] Under the statutory time frame, once a property becomes delinquent, the taxpayer has a minimum of a year and several months to pay the delinquency, and two years to redeem the property. In addition there is a thirty-day period to redeem the property after a public sale, and a further period if the property does not sell at the public sale. *See* Ark. Code Ann. §§ 27-37-101, 26-37-307(b), 26-37-202.

public tax sale that would be held on April 17, 2002, should Jones fail to redeem the property. *Id.* The return address on the mailing indicated that the letter was from the Commissioner of State Lands. Appellees' Joint Brief, Suppl. Addendum 18 (hereinafter "Suppl. Add."). Although notices of attempted delivery were left at the North Bryan Street address, neither Jones, nor his wife, who still resided in the home, went to the post office to claim the letter. After three delivery attempts, the post office returned the mailing to the Commissioner as "unclaimed."[4] JA 12; Suppl. Add. 18.

After the initial notice was returned, but prior to the public sale, the Commissioner purchased a title report from Walker Title Abstract Company, which identified Jones as the owner of the property.[5] JA 12; Suppl. Add. 19. On April 1, 2002, the Commissioner published notice of the public sale in the local paper, the Arkansas Democrat Gazette. JA 13. The published notice identified Jones as the owner and included the sale date, redemption information, legal description of the property, lien information, minimum bid, and tax due

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[4] On the form, it may be indicated that the certified mail is returned either as: (1) unclaimed; (2) refused; (3) attempted—not known; (4) insufficient address; (5) no such street/no such number; or (6) no such office in state. Suppl. Add. 18. See also U.S. Postal Serv., *Domestic Mail Manual*, 507 Mailer Services, 1.1 (Jan. 6, 2005), *available at* http://pe.usps.gov/text/dmm300/507.htm ("Nondelivery of Mail"). The notice can also note that the addressee has not left a forwarding address or that the forwarding address has expired. When certified mail is returned as unclaimed, this indicates that a written notice was left at the address, but that no party went to the post office to receive delivery of the mail. *See id.* at Ex. 1.4.1 (USPS Endorsements for Mail Undeliverable as Addressed).

[5] The title also identified the Arkansas Department of Finance and Accounting ("DF&A") as holding unreleased liens on the property. J.A. 12. DF&A was also notified of the sale by certified mail, and accepted delivery of the mailing. *Id.* at 12-13. DF&A is not, and has never been, a party in this matter.

amounts. *Id.*; Suppl. Add. 23-24. Jones still made no attempt to redeem the property prior to the sale.

The public sale did not generate a bid. JA 13. On February 5, 2003, however, respondent Linda K. Flowers submitted a bid to buy the property.[6] *Id.* After receiving the offer, the Commissioner rechecked the county property records and visited the property as part of "negotiated sale research." Suppl. Add. 26 (capitalization omitted). Two weeks later, the Commissioner sent a certified letter to Jones at the North Bryan Street address informing him of the pending sale. JA 13. This letter was also returned "[u]nclaimed." *Id.* Jones again made no effort to redeem the property. The Commissioner issued a Limited Warranty Deed to Flowers on May 28, 2003. *Id.* at 14.

2. On July 2, 2003, Flowers served notice of unlawful detainer to the 717 North Bryan Street house. Appellants' Br. Addendum 11 (hereinafter "Add."); Pet. App. 2a. On July 28, 2003, Jones brought suit against the Commissioner and Flowers in the Circuit Court of Pulaski County, Sixth Division (CV 2003-8565). He claimed that the tax sale and thus Flowers' deed constituted an unlawful taking of his property "in that plaintiff was never given *actual notice of the sale* and never given *actual notice of the right to redeem after sale*." Add. 1 (emphasis supplied).[7] Flowers counterclaimed for unlawful detainer. JA 1.

Flowers and the Commissioner filed motions for summary judgment on October 2, 2003, and November 17, 2003, respectively. JA 1. Jones subsequently filed a cross-motion for summary judgment, claiming that he was entitled to actual

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[6] Ark. Code Ann. § 26-37-202(b) permits the State to negotiate a private sale of any property that fails to generate a bid at a public sale.

[7] Jones later amended the Complaint to add his wife as a plaintiff. JA 1. Mrs. Jones is no longer a party to this action. For the sake of clarity, this brief refers to Jones as if he were the sole Plaintiff/Petitioner throughout.

notice prior to the sale of his property for failure to pay taxes. *Id.* at 2; Add. 41-45.

On January 14, 2004, the trial court granted respondents' motions. App. 3a. The court also granted Flowers' claim of unlawful detainer and granted her immediate possession of the property. *Id.* at 12a-13a. Jones appealed to the Arkansas Supreme Court.

On appeal, Jones asserted that "the trial court erred in ruling that the State was not required to locate Mr. Jones's correct address after the tax-sale notices were returned to the State unclaimed," and that "due process required the State to conduct a reasonable search of public records in an attempt to ascertain Mr. Jones's correct address before selling his property." Pet. App. 5a. The Arkansas Supreme Court found that the Commissioner had strictly complied with the State's notice statute, Ark. Code Ann. § 26-37-301. In addition, the court recited the standard from this Court's *Mullane* decision, and found that the procedures utilized by Arkansas comply with that standard. Specifically, the court pointed out the taxpayer's express legal obligation to apprise the State tax collector of any change in the address to which tax bills are to be sent, Pet. App. 8a, and that "due process does not require actual notice before depriving a property owner of his property," *id.* at 11a (citing *Dusenbery* v. *United States*, 534 U.S. 161 (2002)). Thus, the court held that the State regime did not violate Jones' due process rights. *Id.* [8]

SUMMARY OF THE ARGUMENT

The Commissioner satisfied the notice requirements of the Due Process Clause by twice sending written notice of the tax

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[8] Jones also claimed that the Arkansas statute governing the procedures for selling properties at tax sales, Ark. Code Ann. § 26-37-202(e), is unconstitutional for failing to include a notice requirement. The Arkansas Supreme Court found that claim to be procedurally barred, *see* Pet. App. 3a-4a, and it is not before this Court.

delinquency on Jones' real property by certified mail to his last-known address and, after the mailings were returned as "unclaimed," publishing a detailed notice in the local newspaper. The State's statutory-notice regime also seeks to ensure that its mailings provide actual notice by imposing on the property holder a legal obligation to notify the tax collector directly of any change in address. See Ark. Code Ann. § 26-35-705. This regime fulfilled the requirements of due process because it provided notice "reasonably calculated" to apprise the property owner of the proceedings at issue. *Mullane*, 339 U.S. at 314.

The Due Process Clause does *not* require the State to provide property owners with actual notice of a potential deprivation. *Dusenbery*, 534 U.S. at 170. Where, as here, the State reasonably "attempt[s] to provide actual notice," *id.* (emphasis in original), its constitutional obligation is satisfied. "[T]he very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'" *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1979) (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976)); see also *Parham* v. *J.R.*, 442 U.S. 584, 612-13 (1979). In cases spanning a number of decades and in a wide variety of settings, this Court has established that ordinary mail is a constitutionally sufficient means of seeking to deliver notice to persons whose addresses are known. See, *e.g.*, *Tulsa Prof'l Collection Servs.* v. *Pope*, 485 U.S. 478, 490 (1988) (probate creditor claims); *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 798 (1983) (tax sale of real property); *Walker* v. *City of Hutchison*, 352 U.S. 112, 116 (1956) (real property condemnation). Arkansas' statutory scheme plainly goes beyond the constitutional minimum, providing notice by

certified mail (which has safeguards not possessed by regular mail) and elevating to a legal obligation the maintenance of correct addresses with the real-property tax collector.

Jones' real request is that the Court interpret the Constitution to require not only notice "reasonably calculated" to reach the property holder, but also additional measures if the State learns that actual notice was not received – here, the return of the certified letter as "unclaimed." Initially, in the courts below, Jones claimed that the Commissioner's follow-up measures had to result in actual notice because his whereabouts were publicly available. The Arkansas Supreme Court properly rejected this argument as an attempted circumvention of the Court's precedent holding that actual notice is not required.

Second, the premise of Jones' argument is that the return of the letter as "unclaimed" informed the Commissioner that Jones was no longer at his address. This is wrong – it indicated only that notices were left at the address stating that the Commissioner of State Lands, the real property tax collector, had sent mail to Jones, and that Jones had declined to go to the post office and pick it up. This Court should not impose upon the State tax collector a constitutional requirement to take measures concededly beyond notice reasonably calculated to reach the property holder simply because that entity has learned a fact that creates doubt about the property holder's address (particularly here, where Jones had a legal obligation to keep the address for tax collection on his real property current with the tax collector).

Third, even if follow-up measures were required in this setting, the State tax collector's actions here satisfied the Constitution. The Commissioner provided notice by publication after the certified letters were unclaimed, which is a permissible way of addressing any doubts that may arise about a property holder's location after a clearly constitutional effort has been made. That conclusion is particularly apt where, as here, the property at stake is real

property; and "the assessment of taxes occurs with regularity and predictability," and the forfeiture of delinquent property "cannot reasonably be characterized as unexpected in any sense." *Mennonite*, 462 U.S. at 808 (O'Connor, J., dissenting).

Finally, even putting aside the publication notice, the State tax collector had no obligation to follow up a constitutionally-sufficient notice with additional measures because the message was not actually delivered. Had the Commissioner used regular mail, fully satisfying its due process obligation, it would not have received the information that the mail was returned "unclaimed." A State should not be punished by the imposition of additional administrative burdens, expense and delay for its decision to provide more than the bare constitutional minimum. Moreover, once a State makes a constitutional effort to provide notice, its vital interest in the effective, efficient collection of real property taxes should hold sway. This is particularly true where the last known address is also the address of the property because under *Mullane*, a State is entitled to assume that an absent property owner has either abandoned his property or left it in the hands of a responsible caretaker with "a duty to let him know" if his interest is in jeopardy. 339 U.S. at 316.

Jones' facile suggestions – that the Commissioner should have searched the records of other government agencies or canvassed publicly available sources of information – assume that the relevant question is the burden of locating the address of a single taxpayer who has remained within the State and is easily found. In fact, States send tens of thousands of delinquency notices annually, generating thousands of pieces of information creating doubt about whether the property holder has received notice. Some of these property holders may be easy to locate (though even in this "easy" case, there were applicable legal restrictions and procedures that would have impeded information sharing among government entities, and there were a number of entries of G. Jones in the

relevant telephone book). Others will have moved out of State, or will have more common names, or will be otherwise more difficult to locate.

This Court should not impose upon the States the cost, inefficiency and delay entailed by following up with thousands of delinquent taxpayers whom the government has already made a fully constitutional attempt to notify and who cannot reasonably claim a belief that the non-payment of taxes, here over a period of more than four years, would not result in property loss. See *Bull* v. *United States*, 295 U.S. 247, 259 (1935) ("[t]axes are the lifeblood of government, and their prompt and certain availability an imperious need").

ARGUMENT

DUE PROCESS IS SATISFIED WHEN THE GOVERNMENT MAILS WRITTEN NOTICE OF A TAX SALE OR PROPERTY FORFEITURE TO THE PROPERTY OWNER'S LAST KNOWN ADDRESS.

A. The Fourteenth Amendment's Due Process Clause Requires Notice Reasonably Calculated Under All The Circumstances To Inform A Party Of A Potential Loss Of Property.

The Due Process Clause of the Fourteenth Amendment forbids the State to deprive an individual of life, liberty or property without "due process of law." U.S. Const. amend. XIV, § 1. Due process, in turn, includes the provision of notice and the opportunity to be heard. *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). Where, as here, the sufficiency of notice is at issue, courts apply the standard adopted in this Court's seminal case, *Mullane*, and fleshed out

in numerous subsequent decisions. See *Dusenbery*, 534 U.S. at 167.[9]

Prior to *Mullane*, this Court had held that publication notice was generally sufficient to satisfy due process. See, *e.g.*, *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 284 (1925); Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 765 (2000). But *Mullane* ended the presumption, explaining that although notice by publication is sufficient for unknown or missing persons, the State must try to give notice via more effective means (such as the mail) when a party is known. See 339 U.S. at 319. In words that continue to provide the constitutional standard, *Mullane* held that to satisfy due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314; see also *Greene* v. *Lindsey*, 456 U.S. 444, 449 (1982).

Under the *Mullane* standard, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." See 339 U.S. at 315. Notice satisfies the constitutional standard when "it is in itself reasonably certain to inform those affected . . . or, where conditions do not reasonably permit such notice, [when] the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Id.* (internal citations omitted); see also *Dusenbery*, 534 U.S. at 170. Reasonable statutory notice requirements constitute due process even if they may not perfectly protect all property

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[9] *Dusenbery* recognized that although the Court has applied the balancing test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), in a variety of due process contexts, it has "never viewed *Mathews* as announcing an all-embracing test for deciding due process claims. Since *Mullane* was decided, we have regularly turned to it when confronted with questions regarding the adequacy of the method used to give notice." *Dusenbery*, 534 U.S. at 168 (noting further that the Court saw "no reason to depart from this well-settled practice.").

interests: "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." *American Land Co.* v. *Zeiss*, 219 U.S. 47, 67 (1911).

B. Actual Notice Is Not Required, And Notice Mailed To A Property Owner's Last Known Address Is Reasonable And Therefore Constitutional.

Since *Mullane* was decided, this Court has routinely recognized that it is "impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation." *Schroeder* v. *City of New York*, 371 U.S. 208, 212 (1962).[10] Nonetheless, this Court's decisions have established guiding legal principles that are relevant, indeed dispositive, here.

First, States are not required to provide property owners with actual notice of a potential deprivation. *Dusenbery*, 534 U.S. at 170. If the State reasonably "*attempt[s] to provide* actual notice," *id.*, it has satisfied its due process obligation. See also *United States* v. *One Toshiba Color Television*, 213 F.3d 147, 155 (3d Cir. 2000) (en banc) (the Supreme Court has "never employed an actual notice standard in its jurisprudence. Rather, its focus has always been on the procedures in place to effect notice."). Due process "does not impose an unattainable standard of accuracy." *Grannis*, 234 U.S. at 395.

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[10] *See also Tulsa Prof'l*, 485 U.S. at 484; *Mennonite*, 462 U.S. at 801 (O'Connor, J., dissenting); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Rest. Workers* v. *McElroy*, 367 U.S. 886, 895 (1961) (the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"); *Walker*, 352 U.S. at 115 (noting the "impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions").

> [T]he very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." [*Walters*, 473 U.S. at 321 (quoting *Mathews*, 424 U.S. at 344); see also *Parham*, 442 U.S. at 612-13].

Second, this Court has consistently approved as reasonable, and hence constitutional, notice by mailing to an individual property owner's last known address. *Dusenbery*, 534 U.S. at 169; *Tulsa Prof'l*, 485 U.S. at 490; *Mennonite*, 462 U.S. at 795, 797-98; *Greene* v. *Lindsay*, 456 U.S. 444, 455 (1982); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 13-15 (1978); *Eisen* v. *Carlisle*, 417 U.S. 156, 174-75 (1974); *Bank of Marin* v. *England*, 385 U.S. 99, 102 (1966); *Schroeder*, 371 U.S. at 214; *Covey* v. *Town of Somers*, 351 U.S. 141, 146-47 (1956); *Walker*, 352 U.S. at 116; *New York City* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293, 296-97 (1953). In *Mullane* itself, the Court held that "ordinary mail to the record addresses" of the affected property owners would be constitutionally sufficient. 339 U.S. at 318. See also *Schroeder*, 371 U.S. at 214 (characterizing "the mailing of a single letter" as "a good faith effort to give [information] personally to the appellant").

Application of these two established principles makes clear that Arkansas' statutory regime provides constitutionally-sufficient notice. First, it utilizes certified mail to deliver notice. The mails "are recognized as an efficient and inexpensive means of communication," *Mullane*, 339 U.S. at 319; *Tulsa Prof'l*, 485 U.S. at 490, "upon which prudent men will ordinarily rely in the conduct of important affairs." *Greene*, 456 U.S. at 455. Certified mail "has further safeguards (*i.e.*, signature of recipient upon delivery and return of the signed receipt card)." *Whiting* v. *United States*,

231 F.3d 70, 76 (1st Cir. 2000). Thus, the State made an entirely reasonable choice to rely on a trusted and effective method of communication to inform Jones of the potential deprivation of his property. Indeed, this is a choice that reflects the State's genuine commitment to provide notice and goes beyond the constitutional minimum.

Second, to ensure the accuracy, efficiency, and fairness of its real property tax collection system, the State has enacted a law imposing upon real property owners an express legal obligation to provide the State tax collector with any change in address. See Ark. Stat. Ann. § 26-35-705. This is not a generalized statutory obligation with respect to all legal records of the State government, but an obligation directed specifically to the maintenance of the accuracy of records used in collecting real property taxes. A person is presumed to know his or her legal obligations. See, *e.g.*, *North Laramie Land Co.*, 268 U.S. at 283 ("[A]ll persons are charged with knowledge of the provisions of statutes and must take note of the provisions adopted by them and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land.").

In sum, Arkansas' statutory scheme for providing notice *exceeds* the constitutional standard: It provides not just for mailing, but for certified mailing, and it enacts a legal obligation to underline the importance of maintaining accurate addresses for real property tax collection purposes. There can be no doubt that the notice provided to Jones was constitutionally sufficient.

C. Jones' Assertion That The Due Process Clause Also Requires The State To Undertake Specific Follow Up Measures Should Be Rejected.

The foregoing makes clear that Jones' argument is that the Due Process Clause not only requires "notice reasonably

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane*, 339 U.S. at 314, but also requires specified follow-up measures if there is some reason for the Commissioner to believe that the initial, constitutionally-sufficient notice was not actually received. None of Jones' arguments, however, withstands scrutiny.

1. *The Commissioner's Actions Fulfilled, Indeed Exceeded, All Requirements Of The Due Process Clause.*

Initially, it is noteworthy that in the state courts, Jones uniformly took the position that the Commissioner is required to undertake follow-up measures that result in *actual notice* when it can do so. See *supra* at 6-7; see also Compl. (alleging that the sale and Flowers' deed were "deficient in that plaintiff was never given actual notice of the sale and never given actual notice of the right to redeem after sale. The failure to give actual notice to plaintiff results in an unlawful taking of property without due process . . . .") (Add. 1-2); Mot. for Summ. J. (Add. 41-45); Resp. to Mot. for Summ. J. ("[i]f the property owner's address is reasonably ascertainable the government or tax authority should make all reasonable efforts to see that actual notice is given") (Add. 54). *Dusenbery* holds that the Due Process Clause does not require actual notice, and thus Jones' complaint was properly dismissed by the Arkansas courts on this basis.

In addition, to the extent Jones is seeking to constitutionalize a requirement that the State follow up constitutionally-adequate attempts at mailing notice when the State "*knows*" that the property holder is no longer at the last-known address (Pet. Br. 10), that question is not presented here. It is undisputed that the mailings attempted here were returned as "unclaimed." See *supra* at 5, 6. This did *not* inform the State that Jones was no longer living at the address indicated on the state tax rolls. It indicated only that notices of attempted delivery of mail were left at the last-known address, but that no one went to the post office to claim that

mail. See *supra* at 5 & n.4. As also noted *supra* at 5, the return address of the mailings indicates that their source is the Commissioner of State Lands. For whatever reason, the residents of North Bryan Street chose not to claim the mail; but the situation would be the same if they had declined to accept the certified letter.

Particularly where, as here, the State has in place a statute requiring a property holder to notify the State tax collector of any change in address, the Commissioner cannot be deemed to have known that Jones was no longer at 717 North Bryan Street based on the return of certified mail as "unclaimed." And, under *Mullane*, the Commissioner was entitled to assume that the absent property owner had either abandoned his property or left it in the hands of a responsible caretaker with "a duty to let him know" if his interest is in jeopardy. 339 U.S. at 316. This Court should not constitutionalize a requirement that a State must follow up constitutionally-sufficient mailed notice with additional measures any time the State tax collector learns a fact that simply casts doubt on the continued validity of the address.

Third, this case does not present the question whether a State violates the Due Process Clause if it learns that a constitutionally-sufficient attempt to provide notice has been unsuccessful and then takes *no follow-up measures*. Here, the State *did* take follow-up measures in circumstances where the property holder should have independently been aware that a deprivation was imminent. Specifically, the Commissioner published in the local newspaper a detailed notice of the impending sale of the property, which was published because Jones had not paid taxes in over four years.

Although notice by publication is not, by itself, a constitutionally adequate means of notifying persons whose identities and addresses are known, this Court has held that it may be used to notify persons whose whereabouts are unknown. See, *e.g.*, *Tulsa Prof'l*, 485 U.S. at 491; *Mennonite*, 462 U.S. at 797. Publication is also a reasonable

means for a State to utilize as a follow-up measure after it provides constitutionally-sufficient notice and learns that such notice may not actually have been received. Notice by publication was deemed sufficient for many years; and although the Due Process Clause demands more of State governments today, publication should be a permissible means of addressing any doubts that arise about the location of a property holder after a constitutionally adequate effort has been made.

That is particularly true where the property at stake is real property, and the notice was mailed to the property's location. As previously noted, under *Mullane*, the Commissioner could properly assume that any absent property owner had either abandoned his property or left it in the hands of a responsible caretaker with "a duty to let him know" if his interest is in jeopardy. 339 U.S. at 316. In any event, the failure to pay property taxes is not the type of omission that can be characterized as unknowing or innocent. Every owner of real property is aware that he or she has an annual obligation to pay real property taxes and that the consequence of a failure to do so is first a lien on and ultimately the sale of that property. See, *e.g.*, *Longyear*, 209 U.S. at 418 ("[t]he owner of property whose taxes, duly assessed, have remained unpaid for more than one year must be held to the knowledge that proceedings for sale are liable to be begun").

In Arkansas, real property holders have both a legal obligation to keep their addresses current with the taxing authority and a pragmatic self-interest in complying with that law and protecting their property (*e.g.*, by leaving a responsible caretaker on the premises). No real property holder in Arkansas can reasonably claim that he or she believed that the State has ceased to tax real property or that the failure to receive notice of taxes due meant that no tax payment was required. At the very least, after failing to receive a property tax bill and pay property taxes, a property holder is on inquiry-notice that his property interest is subject

to governmental taking. Here, that delinquency continued over four tax years.

The Commissioner is *not* arguing either that the State had no obligation to provide notice or that it could provide notice solely by publication. The Commissioner's point is that the State has complied with the Due Process Clause when it has (i) provided constitutionally-sufficient notice, (ii) highlighted the importance of the maintenance of accurate addresses for tax assessment purposes by imposing on real property owners an obligation to maintain a correct address, and (iii) followed up with a published notice of sale in a setting involving a property holder who has failed to pay real property taxes or notify the State tax collector of a change in address over a number of years.

Citing *Mennonite*'s statement that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation," 462 U.S. at 799, Jones claims that his failure to comply with his statutory obligations to provide the tax collector with his new address and to pay property taxes are irrelevant. Pet. Br. 14-15. *Mennonite*, however, involved the due process rights of a mortgagee who was *not entitled to any notice of tax sale proceedings under state law* and had only an *option* to request such notice. 462 U.S. at 793, 798-800. This Court held that mortgagees are entitled to "notice reasonably calculated to apprise [them] of a pending tax sale" and that a failure to opt into a notice system does not relieve the State of its due process obligation to provide such notice. *Id.* at 798. Here, in contrast, the State regime provided Jones with constitutionally-adequate notice, and Jones is claiming an additional constitutional right to follow-up measures. Thus, the Commissioner is not arguing that Jones' failure to comply with his statutory obligation forfeits his right to constitutionally-sufficient notice.

Moreover, the Commissioner is relying on the statutory requirement that Jones notify the tax collector of address changes as part of the State's scheme to increase the

likelihood that notice will be effective. The Commissioner was certainly entitled to assume that Jones had complied with this legal obligation, and the Commissioner acted reasonably in relying on that assumption. Indeed, "the law expects at least some diligence from the property owner as well as the local officials" where property is the subject of a tax foreclosure. *Karkoukli's, Inc.* v. *Dohany*, 409 F.3d 279, 286 (6th Cir. 2005). And, the further fact that Jones failed to pay his real property taxes for four years is relevant to the reasonableness of the State's notice regime in the sense that real property owners are fully aware that they must annually pay taxes and that they are subject to the loss of the property if they fail to do so. See *Mennonite*, 462 U.S. at 808 (O'Connor, J., dissenting) ("the assessment of taxes occurs with regularity and predictability" and forfeiture of delinquent property "cannot reasonably be characterized as unexpected in any sense"). In a world where the two certainties are death and taxes, it would have been wholly unreasonable for Jones to believe that his property had somehow become tax-free, or that there would not be consequences for his delinquency.

In sum, the State's notice regime was reasonably calculated to get notice to Jones of the predictable consequences of his long-term property tax delinquency.

2. *This Court Should Not Constitutionalize A Requirement That States That Provide Constitutionally-Sufficient Notice (But Not Actual Notice) Must Make Follow Up Attempts To Discover An Alternative Means To Provide Notice.*

Finally, putting all of the foregoing aside, the Commissioner submits that once a State provides a constitutionally-sufficient notice to a property holder, the Due Process Clause does not require the State to act as if it had made no previous efforts and to undertake an investigation to determine a second constitutionally-sufficient means of providing notice. Where, as here, the State fulfills its constitutional obligation at the time notice is initially sent, the State does not violate due process when that message is not

actually delivered. "[T]he operative question" for sufficiency of notice cases is "whether notice was adequate at the time the notice was sent." See, *e.g.*, *Garcia* v. *Meza*, 235 F.3d 287, 294 (7th Cir. 2000).[11]

Indeed, when the government provides notice through the mails, this Court has found a due process violation *only* where the government knew, in advance of the mailing, that the notice would be ineffective. In *Robinson* v. *Hanrahan*, the Court invalidated notice sent to an incarcerated man's home address because the State knew *prior to the mailing* that he "was not at the address to which the notice was mailed." 409 U.S. 38, 38-40 (1972). Similarly, in *Covey* v. *Town of Somers*, the Court invalidated mailed notice, this time because the State knew *prior to mailing* that the property owner was incompetent and incapable of understanding the notice. 351 U.S. at 146-47.

Jones misleadingly says that these cases stand for the proposition that "[i]n circumstances where the sender knows that an attempt to provide notice has failed, this Court has found the notice inadequate." Pet. Br. 10. In fact, however, the cases involve only notice that was known to be a failure *before it was attempted.* They do not undermine, but support the Commissioner's position that where a decision to effectuate notice via the mails is initially reasonable and in good faith, the government's duty under the Due Process Clause is fully satisfied. See *Garcia*, 235 F.3d at 291 (declining "to impose an affirmative duty upon the

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[11] *See also Karkouli's*, 409 F.3d at 285 (this interpretation "categorize[es] interest holders as either known or unknown at one time only, the time of mailing" and examines sufficiency of notice at that point); *Madewell* v. *Downs*, 68 F.3d 1030, 1046 (8th Cir. 1995) (finding mailed notice sufficient under due process even when returned because the government's decision to mail to the last known address was reasonably calculated to give notice); *Sarit* v. *United States Drug Enforcement Admin.*, 987 F.2d 10, 14 (1st Cir. 1993) (determining that sufficiency of notice is measured when sent).

government to seek out claimants in each case where its initial notice is returned undelivered or to require actual notice in every case").[12] That conclusion is doubly warranted here because Arkansas sought to ensure the accuracy of its tax rolls by enacting a statutory requirement that property tax holders provide the tax collector with their updated addresses.

According to Jones, however, once the State tax collector learns that a constitutional attempt to provide notice was unsuccessful, the State must make another effort to discover a new constitutional method to provide notice. This is essentially an attempted circumvention of the Court's rule that due process does not require actual notice, because Jones would require the State to respond to an attempt known to be unsuccessful with yet another effort. (Jones does not specify how many independent efforts would be required before the State would have satisfied its obligations.) And, Jones' proposed rule renders constitutionally meaningless the State tax collector's initial effort to provide notice because it imposes the same requirement both before and after a constitutionally-sufficient effort has been made. The Commissioner submits that once the State makes a constitutionally adequate attempt to provide notice, it has

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[12] *See also Tsann Kuen Enters.* v. *Campbell*, 129 S.W.3d 822, 831 (Ark. 2003) (refusing to impose an additional burden on the State to locate a property owner if mailed notice of property forfeiture is returned undelivered); *Smith* v. *Cliffs on the Bay Condo. Ass'n*, 617 N.W.2d 536, 541 (Mich. 2000) (per curiam) (holding that the return of notice as undeliverable "does not impose on the state the obligation to undertake an investigation to see if a new address" could be found); *Dahn* v. *Townsell*, 576 N.W.2d 535, 541-42 (S.D. 1998) (finding the State's notice regime adequate where the government mailed notice to owner's last known address, even though that address was incorrect due to owner's failure to change it, and concluding that the State did not have a constitutional obligation to confirm the address); *Elizondo* v. *Read*, 588 N.E.2d 501, 504 (Ind. 1992) (holding that "all that is required is that the auditor send notice to the owner's last known address"); *Clark* v. *Jones*, 519 N.E.2d 158, 160 (Ind. Ct. App. 1988) (same).

fulfilled its obligations under the Due Process Clause. No more is required.

The Commissioner does not dispute that a real property holder's interest in that real property is important and deserving of constitutional protection. But the fact that the property at issue is valuable does not mean that mailing is an inadequate means of notice, as this Court has repeatedly recognized. See *supra* at 14 (citing cases). Moreover, under *Mullane*, the courts must balance "the individual interest sought to be protected by the Fourteenth Amendment," with the government's interests in real property tax collection. 339 U.S. at 314; *Tulsa Prof'l*, 485 U.S. at 484, 488-89.

Clearly, the government has a vital interest in timely, efficient and predictable tax collection. As set forth above, "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation." *Farm Credit Servs.*, 520 U.S. at 826 (citing *J.C. Penney Co.*, 311 U.S. at 444); see also *Mennonite*, 462 U.S. at 806 (O'Connor, J., dissenting) ("[i]t cannot be doubted that the State has a vital interest in the collection of tax revenues in whatever reasonable manner that it chooses" and an "equally strong interest in avoiding" undue burdens to the collection of those funds); Alexander, *supra* at 752, 755 (identifying property taxes as "the dominant source of revenues for local governments in the United States" and describing them as "central to their financial health"). States have an additional interest in preventing the harm that "occurs when property owners simply elect to abandon properties as the amount of delinquent tax approaches the value of the property," which, in turn, leads to "[d]ecaying inner city neighborhoods." *Id.* at 757.

Jones' proposed requirement that a State follow constitutionally-sufficient notice that does not succeed with additional follow-up measures would impose significant and unnecessary fiscal, administrative, and security burdens on the States. States send thousands, indeed tens and hundreds

of thousands, of legal notices every year. In Arkansas, for example, the Commissioner has approximately 18,000 parcels of delinquent real estate certified to his or her office annually, see *Tsann Kuen Enters.* v. *Campbell*, 129 S.W.3d 822, 828 (Ark. 2003). Other States' tax collectors are proportionately situated. These certifications of delinquency, in turn, generate thousands of returned mailings that, in Jones' view, generate constitutional follow-up requirements. Jones suggests a few, deceptively easy steps that the State tax collector could have taken to find *him*, but full consideration of these suggestions demonstrates precisely why they are fundamentally unworkable.

First, Jones claims that the Commissioner should have consulted other agencies that were in possession of his address. Initially, as set forth above, the return of the mailing as "unclaimed" did not inform the Commissioner that Jones had moved. Even assuming that the Commissioner should have treated it as an indication that Jones had moved, there was no indication that he remained within the State. Moreover, as is generally true, the state income tax records that Jones asserts the Commissioner should have checked are not accessible to the Commissioner because they are confidential, see Ark. Code Ann. § 26-18-303, as is the State's drivers' license information, see *id.* §§ 27-14-412, 27-50-906. (The federal equivalent is found at 18 U.S.C. § 2721.)[13] Equally to the point, even assuming that the

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[13] There are provisions in both the tax law and the drivers' license information law that allow government agencies access to private information in the former upon a showing that the agency is auditing or investigating the taxpayer, Ark. Code Ann. § 26-18-303(b)(2), and in the latter upon a showing of reasonable cause based on the agency's need to effectively carry out its statutory duties, *id.* § 27-50-906(a)(7)(A). The exception to non-disclosure of tax information does not appear to apply by its terms, and the exception to non-disclosure of drivers' license information requires the agency to make a particularized showing as to each taxpayer. Obviously neither exception suggests that the

restrictions on inter-agency information sharing were lifted, the *process* of seeking individual information from other governmental agencies in connection with each returned mailing would result in substantial additional costs and delays.

Jones' further suggestion that the Constitution obligates the Commissioner to check public sources such as the internet or the local telephone directory for Gary or G. Jones (Pet. Br. 11-12) is equally misguided. Again, even assuming that the Commissioner had concluded that Jones had moved, why would the Commissioner assume that Jones remained in the same jurisdiction or even the same State? In addition, no court has required such a search to satisfy due process,[14] and Jones ignores the reality that, particularly in large urban areas, there will likely be multiple entries for common names. In fact, in 2000 and 2001, there were multiple entries for G. Jones and Gary Jones in the Little Rock phone book. The task becomes even more difficult if an owner's name is John Smith. Given that there are approximately 18,000 property forfeitures and thousands of returns every year in Arkansas alone, the potential administrative and financial burden of phone book and internet searches and the further investigative burden they create is enormous, adding cost, inefficiency and delay to a State's vital tax collection function.

In the alternative, Jones asserts that the notice should have been posted on the property. Again Jones simply ignores

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Commissioner has ready access to other sources to obtain the real property owner's alternative addresses.

[14] In *United States* v. *125.2 Acres of Land*, 732 F.2d 239, 242 (1st Cir. 1984), the court noted that the government could have found a property owner's address in the phonebook, but there the government possessed a partial address *and* never attempted to mail the owner. The court simply noted that the partial address could easily could have been completed using the phone book (and that a partially addressed letter would have been delivered in the island community where the property owner resided)

what the Arkansas Supreme Court has expressly recognized – that posting "would result in an almost insurmountable burden on the State, *i.e.*, physically locate and post thousands of tracts of land each year. The inability to comply with such a requirement would have a devastating effect on tax sales and undermine the collection of delinquent real estate taxes." *Tsann Kuen*, 129 S.W.3d at 828. Moreover, posting presents a danger to employees of the Commissioner who may be threatened by owners of tax delinquent property.

In all of his suggestions, Jones breezily contends that the Commissioner could easily have taken any of a number of actions, ignoring that the burden on the State tax collector is not measured by the cost, inefficiency and delay in following up with respect to one taxpayer who may be relatively easily located, but instead by the cost, inefficiency and delay imposed by following up with thousands of taxpayers who may or may remain in the State and may or may not be easily found. See *supra* at 13-14.

The foregoing discussion also makes clear that creating a constitutional requirement that sufficient but unsuccessful notice must be followed by additional measures will deeply involve this Court in the formulation and management of State policies regarding tax collection and tax sales. But, this Court's task is only to ascertain what minimum requirement the Constitution imposes on the State, and not "to prescribe the form of service that the [government] should adopt." *Greene*, 456 U.S. at 455 n.9. As the Supreme Court for the State of Michigan recently explained:

> No matter what efforts are made to give notice, the owner who has not, in fact, been provided notice will always contend that something more could have been done. This will make the process of tax sales completely unpredictable, destroying the government's ability to recoup unpaid taxes by foreclosing and reselling. For due process purposes, the focus must be on the constitutional adequacy of the statutory procedure and

> not on whether some additional effort in a particular case would have in fact led to a more certain means of notice. [*Smith* v. *Cliffs on the Bay Condo. Ass'n*, 617 N.W.2d 536, 542 (Mich. 2000) (per curiam)].

The government is not required to engage in "heroic efforts" to give notice, nor to "substitute the procedures proposed by [a] petitioner for those in place." *Greenbery*, 534 U.S. at 170-71. Due process "requires only that the government's effort be 'reasonably calculated' to apprise a party of the pendency of the action: '[t]he criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements . . . .'" *Id.* (quoting *Mullane*, 339 U.S. at 315) (alteration in original). Any additional efforts a State is required to take should be limited to a search of the records held by the taxing authority itself. Requiring a broader search into the records held by other governmental agencies or in the public domain places enormous fiscal and administrative burdens on the States and are inappropriate especially where property owners are able and legally obligated to provide their current mailing information.

In order to protect legitimate governmental interests, and in accord with *Mullane*, Arkansas state law requires that when a property is deemed delinquent, property owners are to be sent a letter via certified mail informing them of their "right to redeem by paying all taxes, penalties, interest and costs, including the cost of the notice." Ark. Code Ann. § 26-37-301(a)(1). The letter is to be sent to the owner's last known address. *Id.* To ensure that the address on file with the State is correct, taxpayers are required by statute to update their addresses if they move. *Id.* § 26-35-705. Thereafter, notice by publication is also made. The Due Process Clause does not require more, particularly where the obligation at issue is that of a real property owner to pay property taxes and where

the property owner failed either to pay such taxes or inquire for the tax bill for years.[15]

CONCLUSION

For the foregoing reasons, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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[15] The State may elect to require more than the constitutional minimum. Arkansas amended Ark. Code Ann. § 26-37-301(e), effective January 1, 2004, to requires as follows:

> If the Commissioner of State Lands fails to receive proof that the notice sent by certified mail under this section was received by the owner of a homestead, as defined under § 26-26-1118(b), then the Commission of State Lands or his or her designee shall provide actual notice to the owner of the homestead, as defined under § 26-26-1118(b), by personal service of process . . . .

This amendment does not apply here, and the enactment of new procedures does not indicate a constitutional "infirmity of those that were replaced." *Dusenbery*, 534 U.S. at 172; *see also supra* at 4 n.2 (showing that the property at issue is not Jones' homestead).

ADDENDUM A

Ark. Code Ann. § 26-37-301. Notice

(a)(1) Subsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs, including the cost of the notice.

(2) All interested parties known to the Commissioner of State Lands shall receive notice of the sale from the Commissioner of State Lands in the same manner.

(b)(1) The notice to the owner or interested party shall also indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale.

(2) The notice shall also indicate the sale date, and that date shall be no earlier than two (2) years after the land is certified to the Commissioner of State Lands.

(c) As used in this section, the terms "owner" and "interested party" shall mean any person, firm, corporation, or partnership holding title to or an interest in the property by virtue of a bona fide recorded instrument at the time of certification to the Commissioner of State Lands.

(d) The Commissioner of State Lands shall not be required to notify, by certified mail or by any other means, any person, firm, corporation, or partnership whose title to or interest in the property is obtained subsequent to certification to the Commissioner of State Lands.

(e)(1) If the Commissioner of State Lands fails to receive proof that the notice sent by certified mail under this section was received by the owner of a homestead, as defined under § 26-26-1118(b), then the Commissioner of State Lands or his or her designee shall provide actual notice to the owner of a homestead, as defined under § 26-26-1118(b), by personal

service of process at least sixty (60) days before the date of sale.

(2) As used in this subsection, "owner of a homestead" means:

(A) Every owner if the homestead is owned by joint tenants; and

(B) Either the husband or the wife if the homestead is owned by tenants by the entirety.

(3) The owner of a homestead shall pay for the additional cost of the notice by personal service of process under this subsection.

(10)

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IN THE

Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
Commissioner of State Lands,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The question in this case is whether due process requires the State to take any further action to attempt to provide notice of an impending deprivation of property when the State learns that its initial effort has failed. This Court's decision in *Mullane* provides the answer: The State is required to do what a reasonable person who actually desired to provide notice would do under the circumstances. Faced with the prompt return of unclaimed mail and the impending sale of an $80,000 house, such a person would take further reasonable steps to try to provide notice. Those steps would include checking readily available sources for a better mailing address, contacting the occupants of the house, and posting a notice on the property.

The State and Solicitor General disagree with this proposition, arguing that a reasonable person would send only one notice, based on information in hand, and would do nothing more when that notice was promptly returned unclaimed. They err by asserting that the sufficiency of the notice effort is judged only by what the State knew when the initial notice attempt was made, rather than at the time the property was taken. And they ignore that, in this case, there were two different tax sales for which notice was required, and notice of the second was sent thirty-four months after the State knew that its chosen notice method was likely a futile gesture.

The State and Solicitor General also argue that it was reasonable to take no action following prompt return of the mailed notices because a state statute requires property owners to report a change of address; return of the letters "unclaimed" did not inform the State that its notice attempt had failed; and, even without notice, Mr. Jones should have realized that his property was about to be lost. As explained below, these arguments improperly attempt to shift the State's constitutional obligations to Mr. Jones and rest on assumptions that have no record support.

The State and Solicitor General further argue that requiring reasonable follow-up steps after an initial notice effort fails would result in costs and administrative burdens that could hinder the government's ability to collect revenue. That argument is fundamentally flawed because in Arkansas, as in most states, the cost of notice is borne by the redeemer or purchaser of the property. Ark. Code Ann. § 26-37-104(a). Indeed, redemption of property by the owner is the most efficient way to collect back taxes. Moreover, the feasibility of follow-up notice efforts is demonstrated by the fact that many state statutory schemes, the most analogous federal statutory scheme, and the vast majority of state and federal court decisions *already* require such efforts under the circumstances presented here. In any event, under basic due process principles, the extent of any additional steps will be constrained by what is reasonable under the circumstances, taking into account the value, importance, and character of the property interest at stake.[1]

A. The Sufficiency Of Notice Must Be Judged In Light Of All The Circumstances And Not Just On What The State Knew When The First Notice Was Sent.

The parties agree that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and that "[t]he

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[1] In her separate brief, respondent Flowers argues that certiorari was improvidently granted because Mr. Jones did not challenge the constitutionality of Ark. Code Ann. § 26-35-705. The same argument was raised in Respondents' Brief in Opposition at 11-12 and fully rebutted in Mr. Jones's petition-stage reply at 6. The question presented is whether due process requires additional reasonable steps to notify a property owner of an impending tax sale where the government knows that its initial effort has failed. Mr. Jones does not challenge § 26-35-705, and, thus, any claim that a challenge to that statute was not preserved for review is a non sequitur.

means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). The parties further agree that due process does not always require receipt of actual notice before property is taken.[2] *See Dusenbery v. United States*, 534 U.S. 161, 170 (2002). And the parties agree that mail can be an adequate means of providing notice when the interested party's correct address is known or can be ascertained. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983); *Greene v. Lindsey*, 456 U.S. 444, 455 (1982); *Mullane*, 339 U.S. at 318-19. The parties' dispute centers on whether due process requires the government to take further steps to try to provide notice when it promptly learns that its initial effort has failed.

Both the State and the Solicitor General argue that whether notice is "reasonably calculated" to inform the interested party is judged solely on the basis of what the sender knew at the time the initial notice was sent and that any later-acquired information is of no constitutional significance. State Br. 22-23; SG Br. 10-12. The State and the Solicitor General read *Mullane*'s phrase "under all the circumstances" to mean "under the circumstances known before notice is first attempted." But

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[2]Respondents and the Solicitor General note that Mr. Jones's complaint alleges that he was never given "actual notice" of the sale or of his right to redeem, and that the failure to give "actual notice" violated his right to due process. *See* JA 5. "[T]he term 'actual notice' is not free from ambiguity" and "the term has been used both to distinguish notice by mail from notice by publication and to refer to the actual receipt of the notice by the intended recipient." *Dusenbery*, 534 U.S. at 170 n.5 (adopting the latter use of the term). When he filed his complaint, Mr. Jones was unaware that the State had attempted to provide notice by mail. In any event, Mr. Jones has consistently argued that the State failed to provide notice reasonably calculated under all the circumstances to inform him of the sale.

that inventive reading is contrary to *Mullane*'s explanation of the standard and fails to recognize that the operative question is whether notice was adequate at the time of the taking.

In *Mullane*, the Court explained that due process is satisfied if the effort made is what a person who actually desired to give notice would do under the same circumstances. Thus, for its view to prevail, the State must argue that a reasonable person who actually desired to communicate with Mr. Jones would ignore the return of the initial mailing and would take no action to ascertain Mr. Jones's correct address or to contact him by other means. Under the circumstances of this case, a reasonable person would not give up so soon. Rather, such a person would seek Mr. Jones's address from readily available sources, contact the occupants of the property, or post a notice at the property. *See, e.g., Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998) ("A reasonable person presented with a letter that has been returned to sender" will take further action "if it is practicable to do so."); *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action.")

The State seeks to distinguish *Robinson v. Hanrahan*, 409 U.S. 38 (1972), and *Covey v. Town of Somers*, 351 U.S. 141 (1956), by emphasizing that, in those cases, the government knew before the initial mailing that the notice would likely be ineffective, whereas in this case, the State did not know its initial mailing was not received until it was returned about two weeks later. The key fact, however, is that the State knew that notice was ineffective about three years before Mr. Jones was deprived of his property. The constitutional violation—a deprivation of property without due process of law—did not occur when the State sent the letter; it occurred when the State sold Mr. Jones's property, knowing that he had not received

notice and having failed to make any effort to rectify the deficiency. Thus, as in *Robinson* and *Covey*, the State knew before it consummated the deprivation that its notice had failed. *See Small*, 136 F.3d at 1337 (holding that, following return of initial mailed notice, *Mullane* requires reasonable attempts to locate the interested party and provide effective notice until forfeiture is final).

The State relies on *Garcia v. Meza*, 235 F.3d 287 (7th Cir. 2000), but that decision *rejected* the rule urged by the State. *Id.* at 291 ("We decline to adopt a per se rule which only examines notice at the time it was sent and turns a blind eye to subsequent events."). Although *Garcia* declined to require the government to seek out claimants in *every* case where initial notice is returned undelivered, the court held that due process had *not* been satisfied even though the notice "was adequate at the time that the notice was sent." *Id.* at 290. *Garcia* held that, because "[t]he government certainly had reason to believe that its one attempt at written notice" had been ineffective, "another attempt at written notice" was required and "would not have been too burdensome on the government." *Id.* at 291.

The State also cites *Karkoukli's, Inc. v. Dohany*, 409 F.3d 279 (6th Cir. 2005). However, in *Karkoukli's*, the Sixth Circuit found it unnecessary to resolve the issue because after "[a]ll the mailed notices were returned as undeliverable by the postal service," the government "attempted to locate [the interested party's] home address in the phone book and on the internet, but did not succeed." *Id.* at 281. The other two federal appellate decisions cited by the State, *Sarit v. Drug Enforcement Admin.*, 987 F.2d 10, 14-15 (1st Cir. 1993), and *Madewell v. Downs*, 68 F.3d 1030, 1047-47 (8th Cir. 1995), do support the theory that, absent exceptional circumstances, the sufficiency of notice is measured when initially sent. Nonetheless, those cases and later cases in those circuits hold

out the possibility that post-notice events will have constitutional relevance. For example, *Whiting v. United States*, 231 F.3d 70, 76 (1st Cir. 2000), held that the government may reasonably assume that certified letters are delivered only "[a]bsent proof to the contrary." *See United States v. Ritchie*, 342 F.3d 903, 911 n.2 (9th Cir. 2003) (noting that the First Circuit has "retreated from its *Sarit* holding"). Similarly, the Eighth Circuit has retreated from *Madewell*, holding in a later case that even certified mail actually received by an individual living at the interested party's house may not have satisfied due process when the government had reason to believe that the party may not have known of the forfeiture proceeding. *United States v. Cupples*, 112 F.3d 318, 319 (8th Cir. 1997). Every other federal circuit that has addressed the issue has held that the government must take additional steps to provide effective notice when it is promptly informed that its initial effort has failed.[3] A majority of the state courts that have addressed the issue also have held that the *Mullane* standard requires reasonable follow-up efforts when the government learns that its initial mailed notice was not received.[4] Thus,

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[3] *See, e.g., Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005); *Akey v. Clinton County*, 375 F.3d 231, 236 (2d Cir. 2004); *Ritchie*, 342 F.3d at 911 (9th Cir.); *Foehl v. United States*, 238 F.3d 474, 479-80 (3d Cir. 2001); *Small*, 136 F.3d at 1337 (D.C. Cir.); *United States v. Rodgers*, 108 F.3d 1247, 1252 (10th Cir. 1997); *Armendariz-Mata v. Drug Enforcement Admin.*, 82 F.3d 679, 683 (5th Cir. 1996).

[4] *See, e.g., Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 85 (Ga. 2003); *Kennedy v. Mossafa*, 789 N.E.2d 607, 611 (N.Y. 2003); *Wells Fargo Credit Corp. v. Ziegler*, 780 P.2d 703, 705 (Okla. 1989); *Rosenberg v. Smidt*, 727 P.2d 778, 781-83 (Alaska 1986); *Giacobbi v. Hall*, 707 P.2d 404, 407 (Idaho 1985); *Vinscon, Inc. v. Ingram*, 835 So. 2d 813, 816 (La. Ct. App. 2002); *City of Boston v. James*, 530 N.E.2d 1254, 1256 (Mass. App.

(continued...)

Sarit, *Madewell*, and the five state court cases cited by the State, St. Br. 22 n.12, reflect a decidedly minority view.

The Solicitor General joins the State in arguing that Mr. Jones's right to due process was extinguished as soon as the government made "one reasonable effort to provide notice" and that all later-acquired information is irrelevant, even if it is acquired when there is ample time to take steps to correct the deficiency. SG Br. 9. By casting the issue as whether the reasonably calculated test "views the notice question *ex ante*, from the government's standpoint at the time that notice is to be given, [or] *ex post*, from the intended recipient's standpoint after his actual whereabouts have been made clear," SG Br. 11, the Solicitor General makes the same error as does the State. It overlooks that there is a third, more reasonable view: namely, that the government must consider information acquired after the initial notice attempt but *before the deprivation* in determining whether, under the circumstances, a *reasonable* person would take further action to find a better address or otherwise ensure meaningful notice. To be clear, Mr. Jones does *not* insist that notice be judged by whether, with the benefit of hindsight, the property owner can point to methods by which he could have been found. Rather, Mr. Jones argues that the government must consider information it acquires *after* the initial notice attempt but *before* the deprivation.

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[4](...continued)
Ct. 1988); *Patrick v. Rice*, 814 P.2d 463, 468 (N.M. App. 1991); *O'Brien v. Port Lawrence Title & Trust*, 688 N.E.2d 1136, 1145 (Ohio Ct. Common Pleas 1997); *Bank of America v. Giant Inland Empire R.V. Ctr., Inc.*, 93 Cal. Rptr. 2d 626, 635 (Cal. Ct. App. 2000).

B. The State Acted Unreasonably When It Sent Notice Of The Negotiated Sale By The Same Method That Had Failed To Notify Mr. Jones Of The Public Sale.

Even if the Court accepts the view that the State violates due process only when it knows prior to mailing that the notice will likely fail, Mr. Jones must still prevail because, when the State attempted to notify him of the *negotiated* sale, the State knew that sending a certified letter to Mr. Jones at the Bryan Street address was likely a "mere gesture." *Mullane*, 339 U.S. at 315. The State knew that such notice was not reasonably calculated to reach Mr. Jones because the same procedure had failed thirty-four months before. *Greene*, 456 U.S. at 455-56 ("[T]he State's continued exclusive reliance on an ineffective means of service is not notice 'reasonably calculated to reach those who could easily be informed by other means at hand.'") (quoting *Mullane*, 339 U.S. at 319).

The State sent the first certified letter to Mr. Jones in April 2000 to notify him of the delinquency and his right to redeem the property before or within thirty days after the public sale scheduled for two years later. *See* Ark. Code Ann. § 26-37-301(b)(2) (requiring notice of the sale date which must be "no earlier than two (2) years after the land is certified to the Commissioner of State Lands"). The letter was promptly returned to the State marked "unclaimed." Mr. Jones's house was offered for public sale on April 17, 2002, but was not sold.

Because the property was not sold at public sale, the State was authorized to negotiate a sale. Ark. Code Ann. § 26-37-202(b). On February 5, 2003, the negotiated sales process began when respondent Flowers submitted a purchase offer. Again, Mr. Jones was entitled to notice of the sale date and of his right to redeem the property until thirty days after the sale. Ark. Code Ann. §§ 26-37-301(b)(2) & 202(e). On February 19, 2003, the State sent notice of the negotiated sale by certified

mail to Mr. Jones at the Bryan Street address. JA 15. At that time, the State had known for thirty-four months that the public sale notice sent by the same method had failed to reach Mr. Jones. Thus, even if it was reasonable in April 2000 for the State to send the public sale notice to Mr. Jones at the Bryan Street address, it was not reasonable to repeat that failed procedure—and *only* that failed procedure—to notify Mr. Jones of the negotiated sale. By February 2003, knowing that Mr. Jones had not received the previous mailed notice, the State had an obligation to attempt to ascertain Mr. Jones's correct mailing address or to consider alternative means of contacting Mr. Jones.

Indeed, at the time it sent notice of the negotiated sale, the State believed (mistakenly) that the Bryan Street house was vacant. After receiving Ms. Flowers's purchase offer, the State conducted "negotiated sale research" that involved a visit to the Bryan Street address to verify that the property existed as described in the deed records and to provide a description of the house and vicinity. The field investigator who viewed the property reported that "the property does appear to be vacant." R 110. Even so, the State, now acting on the belief that certified mail notice would almost certainly be futile, used that procedure without making any effort to ascertain Mr. Jones's correct mailing address.

The State and the Solicitor General concede that, at a minimum, *Robinson* and *Covey* establish that where the government already has information indicating that its method of notice is likely to be ineffective, such notice will not satisfy due process. State Br. 21; SG Br. 13-14. Because the State knew, prior to its mailing, that a notice sent by certified mail to the Bryan Street address was not reasonably calculated to reach Mr. Jones, the State acted in the same manner that it concedes this Court found unconstitutional in *Robinson* and *Covey*.

C. The State Cannot Avoid Its Due Process Obligations By Claiming That It Lacked Knowledge That Its Mailed Notice Had Failed Or By Charging That Mr. Jones Abandoned The Property.

The State argues that even if due process requires further action once the State knows its original notice efforts have failed, the State cannot be charged with such knowledge in this case because the prompt return of the certified mail notices marked "unclaimed" "did *not* inform the State that Jones was no longer living at the address[.]" State Br. 16 (emphasis in original); *see also* SG Br. 21 (same). This argument is a red herring. The question is not whether the State knew that Mr. Jones had moved, but whether it knew that the mailed notices were not received.

1. In a stroke of great irony, the State maintains that its use of certified mail provides more protection to the property owner than regular mail. But the use of certified mail benefits the addressee only derivatively, *if* the sender takes action when it learns that the certified mail was not received.[5] In this case, the State wants credit for using certified mail, but wants relief from its obligation to act where the use of certified mail informs the State that its efforts have failed. In other words, the State's position in this Court makes its use of *certified* mail utterly meaningless.

2. The State also claims that it "could properly assume that any absent property owner had either abandoned his property or left it in the hands of a responsible caretaker." State Br. 18. In fact, Mr. Jones *did* leave his property in the hands of

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[5] "Certified Mail is dispatched and handled in transit as ordinary mail." U.S. Postal Serv., *Domestic Mail Manual* § 503.3.2.1 (Jan. 8, 2006). Thus, it is no more likely to reach its destination than other mail.

responsible caretakers, and if the State had posted a notice on the property or mailed it to "occupant," the caretakers would have notified Mr. Jones, just as they did when Ms. Flowers had the eviction notice served on the occupants.

3. The State further argues that the return of the letters marked "unclaimed" supports an inference that Mr. Jones or the residents of the property saw the return address on the envelopes and, acting contrary to their interests, refused to accept service. However, no evidence indicates that Mr. Jones or the occupants ever saw the envelopes, and the letters were not marked "refused." Although postal service procedures call for the mail carrier to leave a form with a space for identifying the sender, no record evidence even suggests that such a form was left at the house or that it was properly completed, or that the occupants would know the subject of a letter sent by the "Commissioner of State Lands." To the contrary, the record suggests that neither Mr. Jones nor his wife knew that the State had attempted to provide notice by certified mail to the Bryan Street address until four months into this litigation, when the State filed the affidavit of Patricia Lah in support of its summary judgment motion. JA 11; R 50. Thus, this case is not one where the caretaker of the property ignored a "direct attack" upon the owner's rights. *Mullane*, 339 U.S. at 316.

D. It Was Unreasonable For The State To Conclude That It Had Sent Notice To The Best Address Available Or To Rely On "Inquiry-Notice."

The State maintains that it was reasonable to ignore the return of the mailed notices and to not seek Mr. Jones's correct address because Ark. Code Ann. § 26-35-705 requires property owners to report an address change. Thus, according to the State, § 26-35-705, coupled with the presumption that a person knows his legal obligations, supports the conclusion that the State had used the best available address for Mr. Jones even

though the mailings were promptly returned.[6] Similarly, the Solicitor General repeatedly notes that Mr. Jones provided the address to which the notices were sent, SG Br. 7, 16, but downplays the fact the Mr. Jones provided it in 1967, thirty-three years before the State first used that address to send notice that the property taxes had not been paid.

The knowledge gained from the prompt return of the mailed notices in 2000 and 2003 clearly outweighs the State's reliance on § 26-35-705 and the address provided by Mr. Jones in 1967. Indeed, a party's address may be—and here was—"reasonably ascertainable" from sources other than the records of the property tax collector. *See Mennonite*, 462 U.S. at 800 (requiring "[n]otice by mail or other means as certain to ensure actual notice . . . if [the party's] name and address are reasonably ascertainable"); *Mullane*, 399 U.S. at 317 (requiring "due diligence" to ascertain whereabouts of interested party).

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[6]The State concedes that Mr. Jones's failure to comply with § 26-35-705 did not affect his right to constitutionally sufficient notice. State Br. 19. The Solicitor General agrees. SG Br. 16 n.5 (quoting *Mennonite*, 462 U.S. at 799 ("[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.")). Indeed, the view that minimum due process requirements may be circumscribed by state law because property interests themselves are a creature of state law—that, in other words, a property owner "must take the bitter with the sweet"—has been soundly rejected by this Court. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540-41 (1985) ("[I]t is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee . . . . The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."). The right to due process "is conferred, not by legislative grace, but by constitutional guarantee." *Id.* (citation omitted); *see also Vitek v. Jones*, 445 U.S. 480, 491 (1980) (holding that "minimum [procedural] requirements [are] a matter of federal law" and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate").

The State further argues that its failure to provide notice should be excused because "the failure to pay property taxes is not the type of omission that can be characterized as unknowing or innocent." State Br. 18. Thus, according to the State, Mr. Jones must have known that his house was about to be lost. Indeed, both the State and the Solicitor General repeatedly charge that Mr. Jones knowingly stopped paying his taxes after he had done so for thirty years. State Br 4; SG Br. 4. That is not correct. Mr. Jones purchased the house in 1967 with a thirty-year mortgage, and the mortgage company paid the property taxes until 1997. Thus, Mr. Jones did not knowingly stop paying his taxes—he inadvertently failed to begin paying them after the mortgage was retired. The State does not claim that Mr. Jones was ever sent a tax bill, although Ark. Code Ann. § 26-35-705 requires that the tax collector send a statement each year. Rather, the State argues that "after failing to receive a property tax bill and pay property taxes," Mr. Jones was on "inquiry-notice" of the pending tax sale. State Br. 18. This Court has held the opposite: An interested party's "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Mennonite*, 462 U.S. at 800.

In any event, the property owner's "innocence" or lack thereof is irrelevant to the due process analysis. For example, notice may allow a property owner to contest the forfeiture on the ground that the taxes were, in fact, paid, or simply to exercise the owner's substantive right to redeem the property. Regardless, the property owner is entitled to notice. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86-87 (1988) (absent notice, default judgment set aside even where parties agreed that judgment debtor had no defense on merits).

E. Where The State Learns That Its Initial Notice Attempt Has Failed, Reasonable Follow-Up Efforts Will Not Disrupt Its Ability To Collect Taxes.

Both the State and the Solicitor General predict that the cost and burden of taking reasonable follow-up steps to provide effective notice will hinder the government's ability to collect taxes or take property. For many reasons, their dire predictions are unfounded.

First, and fundamentally, the cost of providing effective notice will not be borne by the State—it will be passed on to either the owner who redeems the property or the tax-sale purchaser who buys it. Ark. Code Ann. § 26-37-104(a) ("All costs of notice shall be added to the costs to be collected from the purchaser or redeemer."). Most states have similar statutes that pass the costs associated with tax sales to the purchaser or redeemer of the property.[7] In addition, because governments increasingly sell property tax liens to private investors through securitization programs or bulk sales, they "have begun to view their delinquent tax digests as potential assets rather than

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[7]Cal. Rev. & Tax. Code § 3704.7(c); Haw. Rev. Stat. Ann. § 246-55(d); Idaho Code § 63-1005(3); La. Rev. Stat. Ann. §§ 47:2183.1, 47:2189, 47:2261(C); Me. Rev. Stat. Ann. tit. 36, § 1078; Md. Code Ann., Tax-Prop. §§ 14-813(e)(1), 14-843; Mich. Comp. Laws Ann. § 211.60; Minn. Stat. Ann. § 281.23(8); Miss. Code Ann. §§ 27-43-3, 27-45-3; Mo. Ann. Stat. § 140.405; Mont. Code Ann. § 15-18-112; Nev. Rev. Stat. Ann. §§ 361.5648(5), 361.595(2); N.H. Rev. Stat. Ann. § 80:38-a; N.J. Stat. Ann. §§ 54:5-6, 54:5-61; N.Y. Real Prop. Tax Law § 1110(1); N.D. Cent. Code § 57-28-04(5); Ohio Rev. Code Ann. §§ 5721.25, 5721.38(B)(4), 5721.39; Okla. St. Ann tit. 68, § 3118(A); Or. Rev. Stat. § 312.120(2); 72 Pa. Cons. Stat. Ann. § 5860.602(i); R.I. Gen. Laws § 44-9-27(a); S.D. Codified Laws § 10-25-9; Tenn. Code Ann. §§ 67-5-2501(a), (b)(3); Utah Code Ann. §§ 59-2-1351.1(4), 59-2-1346; Va. Code Ann. §§ 58.1-3965(A), (B), 58.1-3974; Wash. Rev. Code Ann § 84.64.050; W. Va. Code Ann. §§ 11A-3-21, 11A-3-2(c), 11A-3-23(a)(3); Wis. Stat. Ann. § 75.12(4).

administrative burdens." Frank Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 760 (2000) ("[M]ost jurisdictions in the United States permit a private third party to purchase the local government's lien for the taxes due.").

Second, in claiming that follow-up notice will be costly, the State has it exactly backwards. Redemption of property by the owner is the most efficient way for the State to collect past-due taxes. Had the State provided effective notice to Mr. Jones, it would have been able to promptly collect the taxes due. Instead, the State embarked on a cumbersome process that entailed a failed auction followed by a labor-intensive negotiated sale.

Third, the feasibility of providing follow-up notice is demonstrated by the fact that such steps are already required in the majority of jurisdictions where the courts have addressed the issue (*see supra* at 6-7 & nn. 3-4), and many state statutes require such steps, either initially or in response to a failed mailing. For example, California requires the tax collector to make a reasonable effort to ascertain the address of the taxpayer and requires an examination of the tax rolls, the most recent telephone books in the county in which the property is located, and the telephone books covering the area of the last known address of the taxpayer. Cal. Rev. & Tax. Code § 3365. Where the tax bill is mailed to the same address as the property itself, California law requires that the tax collector make a reasonable effort to contact the owner-occupant in person. Cal. Rev. & Tax. Code § 3704.7. In Mississippi, if the initial letter is returned undelivered, the clerk must make "further search and inquiry" to ascertain the owner's address, and must repeat the inquiry if the letter returns undelivered again. Miss. Code Ann. § 27-43-3. In Nevada, if a letter mailed "return receipt requested" returns unsigned, the county treasurer must "make a reasonable attempt to locate and notify the owner." Nev. Rev.

Stat. Ann. § 361.595(3)(b). Where mailed notification is returned without a receipt bearing the interested party's signature, Pennsylvania requires that the tax bureau "exercise reasonable efforts to discover the whereabouts" of the interest-holder, including "a search of current telephone directories for the county." 72 Pa. Cons. Stat. Ann. § 5860.607a. In Rhode Island, if notice addressed to the taxpayer's last known address is returned, a city officer may be petitioned to "make a personal inquiry into the whereabouts of the taxpayer. The inquiry shall include visits to the taxpayer's premises, and inquiries with neighbors, known relatives, employers, and any other person or entity who the officer may reasonably conclude has information to the whereabouts of the taxpayer." R.I. Gen. Laws § 44-9-25.1(2).

Similarly, the assertion that posting notice on the property or contacting the occupants would impose an insurmountable burden on the State is belied by the fact that State personnel visited the property in this very case, as is standard procedure for negotiated sales, and could have then posted a notice virtually cost free.[8] Indeed, the feasibility of contacting the occupants is shown by the ease with which Ms. Flowers served them with an eviction notice immediately after the post-sale redemption period expired. Moreover, the feasibility of posting and contacting occupants is demonstrated by the "current practice" in many states and under certain federal statutes. *Connecticut v. Doehr*, 501 U.S. 1, 17-18 (1991) (basing conclusion of due process feasibility on a survey of state law).

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[8]The State and Solicitor General claim that posting would be impossible because 18,000 parcels of Arkansas real estate are certified as tax delinquent each year, but they offer no estimate of the number of mailed notices of delinquency that are returned unclaimed.

At least eight states require posting on the property,[9] either at the outset or as a follow-up measure, and at least thirteen states require notice to the occupants,[10] as do some federal statutes.[11] Although posting will not always be effective, *see, e.g.*, *Greene*, 456 U.S. at 452-53; *Schroeder v. City of New York*, 371 U.S. 208, 282 (1962), it is often a practical and efficient way to reach an owner of real property. In the circumstances of this case, notice to the occupants of the house would have been an intuitively reasonable step. The State acknowledges that an absent property owner will often leave the property "in the hands of a responsible caretaker with a 'duty to let him know' if his interest is in jeopardy." State Br. 10 (quoting *Mullane*). A mailed, personally served, or posted notice—addressed to *occupant* rather than to the owner—is a reasonable way to reach such a caretaker, and takes advantage of the natural alignment of the interests of the property owner with the occupant's

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[9]Del. Code Ann. tit. 9, §§ 8772 & 8724; Fla. Stat. Ann. § 197.522(2)(a); Ga. Code Ann. § 48-4-78(d); Haw. Rev. Stat. Ann. § 246-56; Md. Code Ann., Tax-Prop § 14-836(b)(6); Minn. Stat. Ann. § 281.23(6); Okla. Stat. Ann. tit. 68 § 3118(A); S.C. Code Ann. § 12-51-40.

[10]Ga. Code Ann. § 48-4-45(a)(1)(B); 35 Ill. Comp. Stat. §§ 200/21-75(a), 200/22-10, 200/22-15; Me. Rev. Stat. Ann. tit. 36, § 1073; Md. Code Ann., Tax-Prop. § 14-836(b)(4)(i)(2), (b)(4)(iv); Mich. Comp. Laws Ann. § 211.78i(3); Minn. Stat. Ann. §281.23(6); Mont. Code Ann. § 15-18-212(1)(a), (2)(a); N.D. Cent. Code § 57-28-04 (3); Okla. Stat. Ann. tit. 68 § 3118; S.D. Codified Laws § 10-25-5; Utah Code Ann. § 59-2-1351(2)(a); Wis. Stat. Ann. § 75.12(1); Wyo. Stat. Ann. § 39-13-108.

[11]For example, the Federal Debt Collection Practices Act requires written notice to the tenants of the real property subject to sale. 28 U.S.C. § 3203(g)(1)(A)(i)(IV). Foreclosures by the Secretary of Housing and Urban Development require notice to the occupants of the property, 12 U.S.C. § 3758(2)(A)(iii), and, if the occupants' names are unknown, notice to be posted on the property. *Id.* § 3758(2)(B)(ii).

interest in stable housing, which will induce her to contact an absentee owner.

The Solicitor General filed his brief in this case "[b]ecause a number of federal agencies have the ability to seize property in certain situations." SG Br. 1. But in arguing that additional efforts to locate property owners would impose onerous administrative burdens, the Solicitor General conspicuously fails to discuss the most obvious federal counterpart to the process at issue here: that used by the IRS before selling property seized to collect delinquent federal taxes. Because "[t]he consequences of seizure and sale are often staggering and irreversible . . . Congress has imposed precise strictures on the seizure and sale of property to satisfy legitimate tax deficiencies." *Reece v. Scoggins*, 506 F.2d 967, 971 (5th Cir. 1975). Before it may sell such property, the IRS must personally serve the owner with notice or leave notice at the owner's actual home or business. 26 U.S.C. § 6335(a); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 377 F.3d 592 (6th Cir. 2004), *aff'd on other grounds*, 125 S. Ct. 2363 (2005). Only if personal service has been attempted and "the owner cannot be readily located," 26 U.S.C. § 6335(a), may the IRS resort to sending certified mail to the last known address. *Powelson v. United States*, 979 F.2d 141 (9th Cir. 1992) (holding that the IRS must make "a reasonable attempt to personally serve" the property owner before mailing notice). These requirements, which have been strictly enforced by the federal courts for more than fifty years, belie the Solicitor General's claims of administrative burden.

The Solicitor General asserts that the ease with which Mr. Jones could have been found is apparent only *ex post* with the benefit of hindsight, and both the State and the Solicitor General complain that they had no way of knowing that Mr. Jones could easily have been found and that there are

restrictions on the State's ability to search its own records. These arguments miss the mark. First, the State did not know how easily it could have located Mr. Jones only because it did not try to find him.[12] Second, it would have been reasonable to look first for Mr. Jones in Little Rock or in Arkansas because Census Bureau data indicates that most people who move stay close to their earlier homes.[13] Third, the claim that privacy laws would prohibit the State from finding Mr. Jones's correct address in the State's own records is vastly overstated.[14]

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[12]The minimal cost of such a search is demonstrated by the fact that address-updating and skip-tracing are the standard practice in distributing benefits in class actions, even when the individual property interests at stake are generally far lower than they are in the context of real property foreclosures. *See* S. Rossman and D. Edelman, *Consumer Class Actions* (5th ed. 2002) § 13.2.3 at 174-75 ("With the advent of the Internet, it has become quite simple to track down many individuals" using websites that "provide addresses for no charge. Another inexpensive way to locate individuals is to order a partial credit report."). The use of skip-tracers can be particularly effective. *Id.* ("[W]ithout skip tracers, typical consumer class actions will distribute benefits to only twenty-five percent of the class. Using skip-tracers can increase the percentage of members receiving benefits to seventy-five percent."). Moreover, "[m]ost skip-tracers work on a contingent fee basis and therefore will only be paid if they find the class member's correct address" and the cost of skip-tracing or address locating is sometimes deducted from the recovery of class members who are found. *Id.*

[13]For example, in 2003, 59% of people who moved stayed in the same county; an additional 19% stayed in the same state. U.S. Census Bureau, *Geographical Mobility 2002-2003* (2004).

[14]For example, although drivers' license information is generally protected, *see* Ark. Code Ann. § 27-50-906, the statute contains an exception for any agency that needs the information to carry out its statutory duties. Ark. Code Ann. § 27-50-906(a)(7)(A). The federal statute that protects the privacy of state motor vehicle records has a similar exception. 18 U.S.C. § 2721(b)(1). Similarly, Arkansas voter registration data is available to the public. *See* Ark. Const., am. 51.

Finally, due process does not require that further efforts be made at any cost until success is achieved. Rather, due process requires the State to consider steps that might result in more effective notice and to engage in such steps as are reasonable under the circumstances, taking into account the burden of making additional efforts in light of the value and importance of the property interest at stake. Here, the State struck that balance in a way that offends due process.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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GARY KENT JONES, PETITIONER

v.

LINDA K. FLOWERS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment required the State of Arkansas to search for an alternative address for a delinquent taxpayer when notices of the tax sale and right to redeem that were sent to his last known address by certified mail were returned "unclaimed."

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In the Supreme Court of the United States

No. 04-1477

GARY KENT JONES, PETITIONER

v.

LINDA K. FLOWERS, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether the State of Arkansas satisfied constitutional due process standards for notice when it seized and sold property belonging to petitioner after he failed to pay his taxes on his real property. Because a number of federal agencies have the ability to seize property in certain situations upon giving adequate notice, the United States has a substantial interest in the question presented. Under the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, for example, the federal government may enforce judgments through the seizure of property. Before a sale of property may be undertaken, the government must publish notice of the sale and "serve written notice of public sale by personal delivery, or certified or registered mail to each person whom the marshal has reasonable cause to believe * * * has an interest in property under

execution * * * to the last known address of each such person." 28 U.S.C. 3203(g)(1)(A)(i)(IV).

The Small Business Administration (SBA), see 15 U.S.C. 636(a)(6), and the Department of Agriculture make loans that may be secured by real property that may become subject to foreclosure proceedings. See 42 U.S.C. 1471 (loans by Secretary of Agriculture); see also 7 C.F.R. 3550.59(a)(1), 3550.108. Notices of delinquency and foreclosure frequently must be sent to the borrowers on such loans. The Secretary of Housing and Urban Development also has authority to foreclose on single-family property pursuant to 42 U.S.C. 3535(i) and 12 U.S.C. 3753. Notice of foreclosure proceedings pursuant to 12 U.S.C. 3753 must be provided by certified or registered mail, 12 U.S.C. 3758(2)(A), and notice "shall be deemed duly given upon mailing, whether or not received by the addressee and whether or not a return receipt is received or the notice is returned." 12 U.S.C. 3758(2)(C).

The government also forfeits property in a variety of circumstances. For example, the customs laws have long provided for the seizure and civil forfeiture of items imported in violation of law. See, e.g., 19 U.S.C. 1305, 1497, 1595a. Seizure and forfeiture is also authorized for property involved in a wide variety of crimin[illegible]fenses. See, e.g., 18 U.S.C. 981; 21 U.S.C. 881. The government must provide constitutionally valid notice of such forfeitures, the procedures for which are generally supplied by the customs laws. See 18 U.S.C. 981(d); 21 U.SC. 881(d). Under 19 U.S.C. 1607(a), the government must provide notice by publication for three successive weeks and "[w]ritten notice * * * shall be sent to each party who appears to have an interest in the seized article." See generally *Dusenberry* v. *United States*, 534 U.S. 161, 163-166 (2002). If someone contests the forfeiture, the Government must commence a judicial forfeiture action, see 18 U.S.C. 983(a)(3) and 19 U.S.C. 1608, which requires the republication

of notice under Supplemental Rule for Admiralty and Maritime Claims C(4).[1]

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

STATEMENT

1. At the time of the events in this case, Arkansas law provided that "[s]ubsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs" and to "indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale." Ark. Code Ann. § 26-37-301 (1997).[2] Arkansas law fur-

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[1] The Judicial Conference has transmitted to this Court a proposed revision to the Supplemental Rules. That revision would provide for the first time that the Government must send direct written notice of the judicial forfeiture action and a copy of the complaint "to any person who reasonably appears to be a potential claimant." Proposed Supp. R. G(4)(b)(i). The revision would also provide that notice to a person who was arrested when the property was seized, but who is not incarcerated when notice is sent, "may be sent to the address that person last gave to the agency that arrested or released the person." Proposed Supp. R. G(4)(b)(iii)(D); see Proposed Supp. R. G(4)(b)(iii)(E) (notice to non-incarcerated person from whom property was seized "may be sent to the last address that person gave to the agency that seized the property").

[2] The statute was subsequently revised to provide that, "[i]f the Commissioner of State Lands fails to receive proof that the notice sent by certified mail * * * was received by the owner of a homestead," the Commissioner shall provide "actual notice to the owner * * * by personal service of process." Ark. Code Ann. § 26-37-301(e)(1) (Supp. 2005) (effective Jan. 1, 2004). If petitioner is correct that he had not lived at

ther provided that, "[i]n the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address." *Id.* § 26-35-705.

2. Petitioner purchased the property at issue in this case, located at 717 North Bryan Street, Little Rock, Arkansas, in 1967. He asserts that he resided there until 1993, when he moved to an apartment, but he continued to pay his property taxes through 1996. Petitioner's wife remained in the house. Petitioner did not notify the property tax collector of his new mailing address, as required by Ark. Code Ann. § 26-35-705 (1997). Pet. App. 2a.

Petitioner failed to pay his property taxes for the years 1997-2000. Pet. App. 2a. In 2000, the State mailed a certified letter to petitioner notifying him of the delinquency and stating that the property would be subject to a public sale on April 17, 2002. *Ibid.*; J.A. 12; see Supp. Add. before Ark. Sup. Ct. (Supp. Add.) 15-17. The return address on the envelope was "Commissioner of State Lands, 109 State Capitol, Little Rock, AR 72201-1012." Supp. Add. 18.

The letter was returned to the State marked "unclaimed" after three unsuccessful attempts by the Post Office to deliver it, on April 13, 19, and 29, 2000. J.A. 12; Supp. Add. 18. The State subsequently purchased a title report verifying petitioner's ownership of the property. J.A. 12; Supp. Add. 19. On April 1, 2002, a notice of the public sale, which also con-

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the property in question since 1993, see J.A. 10, the property would not have been his homestead when notice was given in 2000. See Ark. Ann. Code § 26-26-1122(a) (Supp. 2005) (defining "homestead" as a "dwelling of a person that is used as [the person's] principal place of residence"). In any event, the change in law would not suggest that the prior system was constitutionally deficient. See *Dusenbery* v. *United States*, 534 U.S. 161, 172 (2002) ("Even if one accepts that the * * * current procedures improve delivery to some degree, our cases have never held that improvements in the reliability of new procedures necessarily demonstrate the infirmity of those that were replaced.").

tained redemption information, was published in the newspaper. J.A. 12; Supp. Add. 22-24.

No bids were made at the time of the public sale, but on February 5, 2003, respondent Linda K. Flowers submitted a purchase offer to the State. Pet. App. 2a; J.A. 13; Supp. Add. 25. The State subsequently conducted additional research concerning the property, which showed that it remained titled to petitioner. J.A. 12; Supp. Add. 26. On February 19, 2003, the State sent another certified letter to petitioner at the property address, stating that the property would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid.[3] Pet. App. 2a; J.A. 15-16. The return address on that envelope again read "Commissioner of State Lands" at the same address as the 2000 letter. Supp. Add. 28. The letter was returned to the State as "unclaimed" after the Postal Service apparently unsuccessfully sought to deliver it three times. Pet. App. 2a; J.A. 13; Supp. Add. 28. The State then sold the property to Flowers. Pet. App. 2a; J.A. 14.

An unlawful detainer notice was posted on the door of the property on or about July 2, 2003, after the expiration of the 30-day period in which petitioner could have redeemed the property. Pet. App. 2a. The notice stated that any occupants had three days to vacate the premises or a civil action could be brought against them, and ten days to vacate the premises before being subject to criminal prosecution. Petitioner's Add. before Ark. Sup. Ct. (Pet. Add.) 11.

3. Petitioner filed suit against Flowers and the Commissioner of State Lands on July 28, 2003, seeking to set aside the land sale and challenging the constitutionality of Ark.

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[3] A handwritten notation on the page showing the research that was conducted after Flowers made her offer indicates that instructions were given to send one notice by certified mail and one notice by "reg. mail," which could refer to "registered" or "regular" mail. See Supp Add. 26. The record, however, does not indicate whether such a duplicate notice was actually sent by either of those means.

Code Ann. § 26-37-301 (1997). See J.A. 4-6. Petitioner alleged that the sale of his property was invalid because he did not receive actual notice of the tax sale or of his right to redeem. Pet. App. 2a. He also claimed that due process required the State to conduct a search of public records in an attempt to ascertain his correct address before selling his property. *Id.* at 5a. Flowers filed a counterclaim for unlawful detainer. *Id.* at 3a. The trial court granted summary judgment for respondents, finding that the notice complied with constitutional due process requirements. Pet. Add. 87-88.

4. The Arkansas Supreme Court affirmed, relying in large part on its prior decision in *Tsann Kuen Enterprises Co.* v. *Campbell*, 129 S.W.3d 822 (Ark. 2003). Pet. App. 1a-11a. The court rejected petitioner's argument that the State was "required to search the public records or the phone book in order to ascertain the property owner's correct address," explaining that petitioner "ignores the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address." *Id.* at 10a. The court also reasoned that "there is no requirement that actual notice be given in order to comply with the requirements of due process," *id.* at 11a (citing *Dusenbery* v. *United States*, 534 U.S. 161 (2002)), and that "there is no dispute that the State attempted to provide [petitioner and his wife] with notice, both via certified mail and through publication in the newspaper." *Ibid.* In those circumstances, the court held, providing notice via certified mail did not violate the Due Process Clause. *Ibid.*

SUMMARY OF ARGUMENT

The Due Process Clause generally requires notice reasonably calculated to inform the intended recipient of an upcoming proceeding that could affect the recipient's property interests. *Mullane* v. *Central Hanover Bank Trust Co.*, 339 U.S. 306 (1950). Under that test, the fact that notice does not actually reach the recipient does not render it constitutionally inadequate. *Dusenbery*, 534 U.S. at 172. Moreover, the ade-

quacy of notice must be assessed *ex ante*, from the standpoint of the party giving notice, not *ex post*, when the intended recipient comes forward months or years later and explains how he could have been reached.

Based on those principles, this Court has repeatedly held that notice by mail to an address reasonably believed to be correct is constitutionally adequate under the Due Process Clause. The Court has found notice by mail to be inadequate in only two cases, in each of which the party responsible for giving notice already *knew*, even before the notice was sent, that notice by mail was not reasonably calculated to notify the recipient of the upcoming proceeding. While the Court has repeatedly emphasized that notice by mail to a readily ascertainable person and address is constitutionally sufficient, the Court has never held or suggested that such notice, if sent to an address and in a manner reasonably calculated to reach the intended recipient, is deficient.

In this case, moreover, the State had an exceptionally sound basis for believing that the notice by mail was reasonably calculated to reach petitioner. Among other factors, the notice was sent to an address provided by petitioner himself; the notice was sent via certified mail, return receipt requested; and petitioner was under a state-law obligation to update his address if it changed. Because the notice was thus reasonably calculated to apprise petitioner of the upcoming proceeding, it was constitutionally sufficient.

Contrary to petitioner's submission, a State need not continually and repeatedly find and employ new means of notification merely because it has reason to believe that its initial effort, though reasonably calculated to reach the recipient (and therefore constitutionally adequate in itself), in fact failed to do so. It would be particularly implausible to impose any such wide-ranging obligation on the State in the circumstances of this case, because here the State was never even informed that the address it was using was mistaken. Instead, when the notice was returned marked "unclaimed," the

State knew only that the addressee had abandoned or failed to call for the mail. Moreover, the additional steps taken by the State at that point—publishing notice and re-sending it by certified mail at a later date—reinforce the conclusion that the State did all that was necessary under the Due Process Clause.

Although petitioner argues that the State could easily have located him after the notice was returned, that argument is irrelevant, because the State had no obligation to do so. Moreover, petitioner's argument is implausible even on its own terms, as it rests largely on hindsight, not on the knowledge and means contemporaneously available to the State. Although petitioner argues that his new address could have been found in a telephone directory or on the Internet, those means would at best have identified numerous individuals with his name. Even assuming, contrary to fact, that the State had been informed that petitioner had moved, the State would not have known where in the United States (or indeed the world) to look for him, and it would not have known which, if any, of the many individuals it found under "Gary Jones" or "G. Jones" was the correct Gary Jones. Contacting the occupants of the house in person or posting a notice on the property would have provided no guarantee of notice to petitioner, and would have imposed a significant burden on the State. In any event, certified mail provided a reasonable substitute for those measures, because the Postal Service attempted delivery on six separate occasions, on each of which the occupant had the right to be—and most likely was—informed of the identity of the sender.

Accepting petitioner's submission that the Due Process Clause requires repeated rounds of notice, each designed to account for deficiencies implicitly revealed by earlier unsuccessful efforts, would have a destabilizing effect on property rights and would inject substantial uncertainty into processes designed to accomplish important state goals and to transfer the ownership of property with reliable finality. In adminis-

tering a system such as the State's property tax system, it is essential that the State know what steps it must take to transfer ownership of tax-delinquent property. This Court's traditional "reasonably calculated" test correctly balances the interests involved by requiring the State to undertake one reasonable effort to provide notice. This Court should reject petitioner's alternative requirement of an undetermined number of repeated rounds of notice that would all be subject to later challenge and litigation as inadequate.

ARGUMENT

I. DUE PROCESS IS SATISFIED WHEN NOTICE OF AN UPCOMING TAX SALE IS SENT BY CERTIFIED MAIL TO AN ADDRESS REASONABLY BELIEVED TO BE CORRECT

A. The Due Process Clause Requires Notice Reasonably Calculated, At The Time It Is Sent, To Inform The Recipient Of An Upcoming Proceeding

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.* 339 U.S. 306, 314 (1950). Accord, *e.g.*, *Dusenbery* v. *United States*, 534 U.S. at 168; *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 482 (1988); *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 795 (1983); *Greene* v. *Lindsey*, 456 U.S. 444, 449-450 (1982). As the Court explained in *Mullane*, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," and "[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is itself reasonably certain to inform those affected." 339 U.S. at 315.

Two related subsidiary principles have informed the Court's application of the *Mullane* "reasonably calculated" test. First, the fact that notice does not or may not *actually* reach the intended recipient does not render it constitutionally insufficient. In *Dusenbery*, for example, the prisoner argued that "due process generally requires 'actual notice' to interested parties prior to forfeiture, which [the prisoner] takes to mean actual receipt of notice." 534 U.S. at 169. The Court squarely rejected that proposition, holding that "our cases have never required actual notice." *Id.* at 172; see *id.* at 181 (Ginsburg, J., dissenting) ("The majority is surely correct that the Due Process Clause does not require 'heroic efforts' to ensure actual notice."). As the Court explained, rather than "requir[ing] actual notice in proceedings such as this," the Due Process Clause "requires only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action." *Id.* at 170. See *Mullane*, 339 U.S. at 315 ("The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements."). Indeed, requiring actual receipt of notice would give the intended recipient a ready means of delaying or preventing the government proceeding simply by making himself unavailable or difficult to reach.

Second, the question whether a method of notice is "reasonably calculated" to reach the intended recipient must be answered from the perspective of the party giving notice, and at the time it faces the obligation to provide such notice, not "with the 20/20 vision of hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). That conclusion follows from the very formulation of the standard articulated in *Mullane*: "notice reasonably *calculated*" to inform necessarily implies calculation, *i.e.*, an assessment of the relative likelihood of potential future outcomes. The *Mullane* standard thus focuses not on what can be determined with the benefit of hindsight, but rather on what means a party seeking to give notice "might

reasonably adopt to accomplish it" before the attempt has been made. 339 U.S. at 315.

As the Court has held, moreover, notice by publication is generally insufficient—and notice by mail may be required—if the intended recipient's "name and address are known or very easily ascertainable." *Schroeder* v. *City of New York*, 371 U.S. 208, 212-213 (1962); see, *e.g.*, *Mennonite*, 462 U.S. at 800; *Robinson* v. *Hanrahan*, 409 U.S. 38, 40 (1972); *Mullane*, 339 U.S. at 318 (notice by mail required when "the names and post-office addresses of those affected * * * are at hand"). By making the operation of the notice requirement turn on whether the name and address are "easily ascertainable" or "at hand," the Court necessarily tied the due process inquiry to the knowledge available to the party giving notice at the time such notice is given. See *Tulsa Prof'l Collection Servs.*, 485 U.S. at 491 (remanding for determination whether identity of claimant was "known or reasonably ascertainable" by the party responsible for providing notice, with reference to facts of which that party "was aware" at the time notice was due).

It will always be possible, once an intended recipient has brought suit months or years later, for him to pinpoint precisely how the government could have ensured that he would receive actual notice. See *Smith* v. *Cliffs on the Bay Condominium Ass'n*, 617 N.W.2d 536, 542 (Mich. 2000) ("No matter what efforts are made to give notice, the owner who has not, in fact, been provided notice will always contend that something more could have been done. This will make the process of tax sales completely unpredictable, destroying the government's ability to recoup unpaid taxes by foreclosing and reselling."). But the "reasonably calculated" test necessarily views the notice question *ex ante*, from the government's standpoint at the time that notice is to be given, not *ex post*, from the intended recipient's standpoint after his actual whereabouts have been made clear. The government must be able to determine the adequacy of notice at the time it is provided, and the

fact that in hindsight some other means of notice would have been more successful is of no constitutional significance.

B. Notice By Mail To The Property Owner At An Address Reasonably Believed To Be Correct Satisfies Due Process

1. Applying those standards, the Court has recognized on a number of occasions that providing notice of a government action or proceeding through publication in a newspaper provides a constitutionally adequate means of notifying potentially interested persons whose identity or interests are not known or readily ascertainable. *E.g.*, *Tulsa*, 485 U.S. at 490; *Mennonite*, 462 U.S. at 798; *Mullane*, 339 U.S. at 317; *City of New York* v. *New York, New Haven & Hartford R.R.*, 344 U.S. 293, 296 (1953). The Court has ruled, however, that more specific notice is required when the identity and address of a potentially interested party are known. In a long series of decisions spanning more than half a century and a wide variety of proceedings, the Court has consistently endorsed ordinary mail as "a method * * * recognized as adequate for known addressees when [it] ha[s] found notice by publication insufficient." *Dusenbery*, 534 U.S. at 169.

Thus, in the seminal *Mullane* case, the Court, noting that the mails "are recognized as an efficient and inexpensive means of communication," 339 U.S. at 319, concluded that "ordinary mail to the record addresses" would be sufficient, because it constituted "a serious effort" to inform the beneficiaries of the proceeding. *Id.* at 318. Accord, *e.g.*, *Dusenbery*, 534 U.S. at 172 ("[T]he use of the mail addressed to petitioner at the penitentiary was clearly acceptable for much the same reason that [the Court] ha[s] approved mailed notice in the past."); *Tulsa*, 485 U.S. at 490 ("We have repeatedly recognized that mail service is an inexpensive and efficient mecha-

nism that is reasonably calculated to provide actual notice.");[4] *Mennonite*, 462 U.S. at 798 (where mortgagee is identified in public records, "constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service"); *Schroeder* v. *City of New York*, 371 U.S. 208, 214 (1962) (stating that the city in condemnation proceeding had failed to "make at least a good faith effort to give [the information] personally to the appellant—an obligation which the mailing of a single letter would have discharged"); *Walker* v. *City of Hutchinson*, 352 U.S. 112, 116 (1956) (noting that "[e]ven a letter would have apprised [a homeowner] that his property was about to be taken").

2. In two cases, the Court has found that notice by mail was inadequate in a narrow set of circumstances. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972); *Covey* v. *Town of Somers*, 351 U.S. 141 (1956). Contrary to petitioner's argument (Br. 10-11), those cases do not establish that "where the sender knows that an attempt to provide notice has failed, this Court has found the notice inadequate." Instead, in each of those cases, notice by mail was not "reasonably calculated" to inform because the party giving notice knew, *at the time of the initial obligation to provide notice*, that the mailed notice would likely fail.

In *Covey*, the Court held that a town's mailing of a notice of an upcoming tax lien foreclosure proceeding to a landowner who was "known by the officials and citizens of the Town * * * to be a person without mental capacity to handle her affairs or to understand the meaning of any notice served upon her"

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[4] In *Tulsa*, the Court referred to notice by mail as providing "actual notice," but that did not imply that such notice is ineffective unless actually received. See 485 U.S. at 489-490. Rather, the Court used that term to distinguish notice by mail from notice by publication, which is commonly described as a form of "constructive notice." *Mennonite*, 462 U.S. at 798; see *Dusenberry*, 534 U.S. at 169 n.5.

was insufficient. 351 U.S. at 145. Similarly, in *Robinson*, the State mailed notice of a forfeiture to an owner of an automobile at his home address, rather than at the jail where he was being held. The Court held that the notice was inadequate because "the State knew that [the owner] was not at the address to which the notice was mailed and, moreover, knew also that [the owner] could not get to that address since he was at that very time confined in Cook County jail." 409 U.S. at 40.

In both *Covey* and *Robinson*, therefore, the notice was constitutionally insufficient because the State knew in advance that the notice was highly unlikely to reach (or be understood by) its intended recipient, and thus "it cannot be said that the State made any effort to provide notice which was 'reasonably calculated' to apprise [the owner] of the [pending] proceedings." *Robinson*, 409 U.S. at 40. The Court has consistently held, however, that notice *is* constitutionally sufficient if mailed, as it was here, to an address reasonably believed at the time of mailing to be that of the intended recipient.

3. The Court's recognition of the adequacy of notice by mail comports with common experience. Mailing to a known address or addresses reasonably believed to be those of the intended recipient is a means of communication "upon which prudent men will ordinarily rely in the conduct of important affairs." *Greene*, 456 U.S. at 455. It is a means of providing notice "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. And it imposes only a "relatively modest administrative burden." *Mennonite*, 462 U.S. at 800. For all those reasons, this Court should adhere to its precedents holding that a party required to give notice fully satisfies its constitutional obligations when it provides notice by mail to the address reasonably believed to be that of the party entitled to notice.

II. THE NOTICE IN THIS CASE WAS CONSTITUTIONALLY ADEQUATE

In this case, the State of Arkansas twice mailed notice that was reasonably calculated to reach petitioner. Having done so, the State satisfied its constitutional obligations. The return of the notice did not trigger a crescendo of increasingly demanding constitutional obligations. While return of the notice did inform the State that petitioner had never in fact opened it, it did not inform the State of any other fact about whether the address was correct, whether subsequent efforts might succeed, or whether some new address might be relevant. In any event, the State was not required, before enforcing its tax laws, to undertake a further highly speculative and burdensome investigation to determine whether there might be some other way to reach petitioner.

A. The Notice Was Reasonably Calculated To Apprise Respondent Of The Tax Sale

At the time of the State's initial obligation to provide notice, the notice it sent by certified mail was reasonably calculated to apprise petitioner of the upcoming tax sale. Indeed, petitioner himself concedes (Pet. Br. 8) that "[i]t may have been reasonable for the State first to attempt to notify [petitioner] by certified mail sent to the Bryan Street address." That should end the constitutional inquiry. While such notice did not guarantee that petitioner would actually be apprised of the upcoming sale, this Court's cases, cited above, establish that notice by mail fully satisfied constitutional standards in the circumstances of this case.

As explained above, this Court has held that notice is not constitutionally adequate if at the time of the initial burden to provide notice the State sends it to an address or via a method that the State knows is unlikely to apprise the intended recipient of the upcoming legal proceeding. See pp. 13-14, *supra*. Conversely, however, the fact that the State has good reason

to believe that the address (or addresses) it is using is (or are) correct supports the conclusion that the method of notice is constitutionally valid.

First, the State sent the notice to an address that petitioner himself had supplied in connection with his ownership of the particular property for which the tax sale was to take place. See Pet. App. 8a. When a person has himself identified a particular address as the place to reach him, the State reasonably may rely on that address when it needs to apprise him of an upcoming proceeding. That is particularly true when, as here, the person has supplied the address precisely for purposes of the type of proceeding for which the State now must provide notice. Indeed, that appears to be the theory underlying the new Proposed Supplemental Rule for Admiralty and Maritime Claims G(4). See note 1, *supra*.

Second, although the address may have been first supplied when petitioner purchased the property in 1967, the State had good reason to believe that it was still accurate when notice was mailed in 2000, because Arkansas law provides that, "[i]n the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address." Ark. Code Ann. § 26-35-705 (1997); see Pet. App. 10a. Petitioner has not alleged that he provided any such notice to the State in this case. Accordingly, there was particularly strong support for the State's belief that the notice sent to petitioner at the most recent address on his property tax records was reasonably calculated to inform him of the upcoming tax sale.[5]

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[5] Although, as petitioner asserts (Pet. Br. 16), "a party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligations," *Mennonite*, 462 U.S. at 799, the obligation imposed by the Arkansas statute is highly relevant both to whether the State *reasonably* believed that the address on file was correct and to the question whether a burden should be imposed on the State to remedy petitioner's lack of compliance. See *Davis Oil Co.* v. *Mills*, 873 F.2d 774, 791 (5th Cir. 1989) (noting that requiring interested party to request notice would not run afoul of *Mennonite* because it

Finally, the State sent the notice via certified mail, return receipt requested. This Court has regularly held that notice by first-class mail is sufficient to satisfy constitutional standards. *Mullane*, 319 U.S. at 318. But certified mail, return receipt requested, is particularly likely not to be misdelivered, because the mail carrier must obtain a signature and because mail standards provide for repeated efforts to notify the recipient that mail has arrived.[6] Moreover, "the delivery and request for signature of a return receipt would alert [an individual] to the fact that the letter contains something of more than routine interest." *Weigner* v. *City of New York*, 852 F.2d 646, 650 (2d Cir. 1988).

The State thus sent notice to petitioner at the address that was reasonably calculated to apprise petitioner of the upcoming proceeding. Although there may be cases in which more than one such address is readily available to the State, petitioner does not assert, and the record in this case does not reveal, that there was any additional available address that the State could have used to apprise petitioner of the upcoming proceeding. Accordingly, the State's attempt to give notice was constitutionally sufficient.

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would not "impose a burden of constant vigilance on the property owner," but would allow "one * * * to protect his or her interest * * * through a single, simple act").

[6] The record does not reflect what actually happened upon attempted delivery of the notices in this case, although the Postal Service attempted three distinct deliveries of the initial notice, see J.A. 12, and it appears that it did the same with the second notice, see Supp. Add. 28. Generally, postal service regulations call for at least two attempts to notify the recipient if mail cannot be delivered, followed ultimately by return to the sender after 15 days. See *United States Postal Operations Manual* § 813.25 (2005) <http://www.nalc.org/depart/cau/pdf/manuals/pom/pomc8.pdf>.

B. The Fact That The Notice Was Returned "Unclaimed" Does Not Make The State's Effort To Provide Notice Constitutionally Inadequate Or Impose Additional Obligations

When, as in this case, a State's attempt at notice is directed to the address or addresses that are reasonably calculated to reach the intended recipient, the State has discharged its constitutional notice obligation. This Court's precedents provide no warrant for the imposition of *further* notice obligations on the basis of after-acquired information, and the Court should not create such a requirement for the first time in this case. Even if the Court were inclined to impose further obligations in unusual circumstances, moreover, there would be no basis for doing so here. Unless the State is actually informed of another address or readily available method of notice that is *more* likely to reach the recipient, the State's compliance with the ordinary constitutional standard in its initial attempt at notice should be deemed constitutionally sufficient. In this case, the return of the notice as "unclaimed" did not inform the State that there was some other address or method of notice that would be more likely to reach petitioner. Accordingly, the notice provided in this case satisfied due process standards.

1. This Court has "allowed the Government to defend the 'reasonableness and hence the constitutional validity of any chosen method * * * on the ground that it is in itself reasonably certain to inform those affected.'" *Dusenbery*, 534 U.S. at 170 (quoting *Mullane*, 339 U.S. at 315). For the reasons given above, the method of notice chosen by the State in this case was "in itself reasonably certain" to inform petitioner of the upcoming proceeding. That is all that the Constitution demands.

A State need not continually seek out and employ new means of notification and new addresses for recipients, merely because events have established—or even, as in this

case, suggested a possibility—that the means originally employed were unsuccessful. This Court has stated that "impractical and extended searches" are "not required in the name of due process." *Mullane*, 339 U.S. at 317-318; see *Mennonite*, 462 U.S. at 798 n.4, 799 (government required only to make "reasonably diligent efforts" and not required "to undertake extraordinary efforts"). Providing constitutionally valid notice "need not be inefficient or burdensome." *Tulsa*, 485 U.S. at 489.

Indeed, the Court has required mailed notice itself—as opposed to notice by publication—only in cases in which the intended recipient's "name and address are known or very easily ascertainable." *Schroeder*, 371 U.S. at 212-213; see p. 11, *supra*. In the event that the initial mailing to a "known or easily ascertain[ed]" address has not reached the recipient, there is no basis in this Court's cases to impose on the government an obligation to begin anew and undertake a further search for an additional method of notice. Any such requirement would in effect drastically tighten the "easily ascertainable" standard. Cf. *Mullane*, 339 U.S. at 318 (mailing necessary when name and address of recipient are "at hand"). Moreover, there is no logical basis for limiting such a requirement to a single iteration, and petitioner does not attempt to do so. See Pet. Br. 10-11. Each time a doubt is raised about whether the notice reached its intended recipient, or whether a more certain means of delivery might be available, petitioner's logic would dictate that the government must incorporate the new information into its calculus and return to the drawing board to find a new method of notice, at least so long as some additional method of notice can be hypothesized.

Such a requirement would impose substantial new burdens on the federal, state, and local governments. In Arkansas alone, for example, 18,000 parcels of real estate are certified to the Commission of State Lands as tax delinquent each year. See *Tsann Kuen Enters.*, 129 S.W.3d at 828. The federal government must provide notices of property-related

proceedings to thousands of property owners who are delinquent on various federal loans each year. See pp. 1-2, *supra*. In addition, several federal agencies that administer asset forfeiture programs provided notice of forfeiture for 25,110 items of property in the year ending September 30, 2004. See U.S. Department of Justice, *Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement Fiscal Year 2004* (*Asset Forefeiture 2004*), at 42.[7] Customs and Border Protection, which administers customs- and immigration-related forfeitures for the federal government, has informed us that it had to provide notices for 42,139 seizures for the year ending September 30, 2005. In a widespread and ongoing program that is essential to the continued operation of government, such as the recovery of delinquent property taxes, administering the customs laws, collection of government loans, or asset forfeiture, providing one round of notice reasonably calculated to inform the owner of an upcoming proceeding is a reasonable burden for the government to undertake; requiring repeated rounds, each of which is more burdensome and uncertain than the last and the adequacy of each of which could be challenged by a disappointed owner, could threaten to make the entire program unworkable.[8]

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[7] The number cited in text is the number of items of property forfeited under programs administered by several specified federal agencies. See *Asset Forfeiture 2004*, at 2. Because each item of property may require notice to several potential owners and/or several potential addresses and because a number of agencies are not included in that figure, the actual number of forfeiture-related notices that the federal government must provide each year is much greater than the number cited in text.

[8] Such a requirement could also provide perverse incentives. In order to avoid onerous administrative burdens to recalculate the sufficiency of notice based on information generated by an initial attempt to provide notice, governments may favor modes of providing notice that do not generate additional information, rather than picking the initial method of providing notice most likely to succeed. The

2. Even assuming *arguendo* that the Due Process Clause might be construed to impose on government the obligation to take additional steps to provide notice in limited circumstances, moreover, there would be no basis for doing so here. This case does not involve the only circumstances in which such a duty could be entertained, namely, when, as the result of a constitutionally adequate mailing, the government gains actual knowledge of a new address for the intended recipient. When, by contrast, the government is informed only that its constitutionally adequate effort at notice has been—or may have been—unsuccessful, this Court's cases cannot plausibly be read to impose a new burden on the government to start the process all over again, search for a new possible address, and send a new notice.

In this case, the State was justified in not undertaking new efforts to locate petitioner when its otherwise constitutionally adequate effort to provide notice was returned "unclaimed." Indeed, the fact that the mail was returned "unclaimed" did not even inform the State that the address supplied by petitioner had become obsolete.

"Unclaimed," which was stamped on both of the certified mail letters when they were returned to the State, is one of several terms the Postal Service uses for undeliverable mail. It is used when the "[a]ddressee abandoned or failed to call for mail." *United States Postal Service Domestic Mail Manual* (DMM), § 507, Exh. 1.4.1 <http://pe.usps.gov/text/dmm300/507.htm>. It thus means merely that the addressee did not actually accept and open the mail. The notation is accordingly used not only when the addressee has moved and

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choice between certified and first-class mail may be illustrative. While certified mail, return receipt requested, is more likely to provide actual notice, it is also more likely to inform the State of an unsuccessful delivery. If that information imposes a new round of obligations on the State, then a State may have incentives to adopt a method of initial notice less likely to provide actual notice.

no one has notified him that the letter was waiting (as is alleged here), but also when, for example, the addressee was informed of the sender's identity as provided for under postal regulations and simply decided not to sign for the letter or pick it up at the post office.[9] Thus, the "unclaimed" notation does not positively inform the sender that the address was wrong or that mail sent to that address would be unlikely to reach the addressee. The Postal Service uses other notations to indicate such more profound failures of address. See *ibid.*[10]

Indeed, despite the fact that the State had no positive notification that the mail had not reached petitioner, the State in this case took at least two further steps to provide notice. First, the State published notice of the forthcoming tax sale. Second, when the State received Flowers' offer to purchase the property in 2003, three years after the original notice, it again sent notice to petitioner at his address of record. Espe-

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[9] Under Postal Service regulations, delivery procedures for certified mail are the same as for registered mail. See *United States Postal Operations Manual* § 813.21 (2005). The regulations provide that "[t]he addressee or a person representing the addressee may obtain the name and address of the sender and may look at registered mail while it is held by the Postal Service employee before accepting delivery and signing the delivery receipt. * * * The mail may not be given to the addressee until the delivery receipt is obtained by the Postal Service employee." *Ibid.* Similarly, even if no one is at home when delivery is attempted, "[t]he carrier must leave a notice of arrival on Form 3849 if the carrier cannot deliver the certified article for any reason." *Id.* § 813.25. That form has a space for the sender's name to be listed by the mail carrier.

[10] The Postal Service uses "Moved, Left No Address" to indicate that the "Addressee moved and filed no change-of-address order," and "Not Deliverable as Addressed—Unable to Forward" to indicate that the mail is "undeliverable at address given; no change-of-address order on file; forwarding order epired." DMM § 507, Exh. 1.4.1. The Postal Service also uses other terms to describe failures in delivery, such as "Attempted—Not Known," "Insufficient address," "No such number," or "No such street." *Ibid.*

cially in light of the additional fact that "[t]he well-known inevitability of taxes and the consequences of not paying them are themselves likely to alert a tax delinquent property owner to the possibility of foreclosure," *Weigner*, 852 F. 2d at 651, those additional steps support the constitutional adequacy of the notice provided by the State.

According to petitioner's affidavit, the State's additional steps were unsuccessful in informing him of the forthcoming sale. J.A. 9-10. But, although notice by publication may not be a first choice, this Court has held that it does provide a constitutionally adequate means of notice in some circumstances, see p. 12, *supra*, and it also provides a readily available "backstop" for any failure of actual notice by mailing. In addition, because the State had never been informed that petitioner no longer lived at the address that the State reasonably used for the original notice, the State acted reasonably in re-sending the notice to that address in 2003. The two additional steps taken by the State in this case reinforce the conclusion that the notice provided was "reasonably calculated, under all the circumstances, to apprise [petitioner] of the pendency of the action." *Mullane*, 339 U.S. at 314.

C. Petitioner's *Ex Post* Contentions That Notice Could Have Been Easily Provided To Him Are Irrelevant And Without Merit

Petitioner argues (Br. 11) that "the State could have easily provided effective notice to [petitioner]" after the notices it sent were returned unclaimed. Petitioner's suggested methods of notice, however, would not have been, in petitioner's terms, "easily provided." To the contrary, the weaknesses in petitioner's suggested modes of notice bolster the conclusion that, once the State had taken constitutionally reasonable steps to provide notice, the State was not required to go through further iterations of the process merely because some doubt about the effectiveness of the first notice had arisen.

1. Petitioner argues that he "was not missing" but "continued to live in the City of Little Rock" and that "the telephone directory and Internet searches that the State could have used to find [petitioner] would have been useful to satisfy due process." Br. 11, 12. To be sure, had the State been informed in 2000 or even in 2003 that the address it was using was not the correct one for petitioner, that petitioner had remained in Little Rock, and that an Internet or telephone directory search would have revealed his current address, the State would have been in a better position to find him. But the State was in fact informed of none of those facts. Indeed, even if the State had surmised from the return of the notice as "unclaimed" that petitioner had moved, the State would have had no particular reason to believe that he had moved to a new location in Little Rock, rather than to a suburb, another cc nmunity in Arkansas, or a location in another State or abroad.

In any event, even if the State had attempted to find him through a directory search, the results would likely have been inconclusive, or at least overinclusive. The State would have been searching not merely for any person under a listing of "Gary Jones" or "G. Jones," but for a person with that name who was the owner of the property at 717 N. Bryan Street. It is likely that the *only* publicly available records connecting petitioner to the property in question were the public land records the State had already consulted. And it is highly likely that any standard search would have turned up numerous individuals with petitioner's name.[11] Absent the hindsight

[11] A search in a common Internet directory service, www.anywho.com, on December 1, 2005, returned eight listings of people named "Gary Jones" in Little Rock, Arkansas, at six different addresses, and 53 listings for "Gary Jones" in the State of Arkansas. Searches of nearby States returned 129 listings in Missouri and 27 listings in Louisiana, and, going farther afield, 241 listings in Texas and 147 in California. Searches on another Internet directory, the "People Search" function of www.yahoo.com,produced slightly fewer results in most of

that petitioner now provides, the State would have had no reason to believe that any of those individuals was more likely to be the owner of the property in question than any other. It is likely that the State's only option would have been to send a notice to each person with petitioner's name in the city, the State, or throughout the country. That could have been both expensive and needlessly alarming to the numerous individuals who had nothing to do with the property at 717 N. Bryan Street, and it could have caused further confusion when recipients of the notice attempted to find out what had occurred.

2. Petitioner's other suggestions present similar problems. For example, petitioner contends (Br. 12) that he "had notified his long-time employer of his new mailing address." Had the State known where petitioner worked, it presumably could have attempted to contact him at work. But there is no reason to believe that the State knew that fact. Thus, petitioner's action in informing his employer that he had moved has no bearing whatever on the difficulty that the State would have had in locating him.

Petitioner also asserts (Br. 12) that various government records contained his name, such as the state voting registration and income tax records. If those systems of records were available to the Commissioner of Lands, they would of course pose the same obstacles as a phone directory system; the State, had it been informed that the address it was using was wrong, would doubtless have found numerous individuals in those other systems named "Gary Jones." The Commissioner of Lands presumably did not know that petitioner had registered to vote in Arkansas or that he had been paying Arkansas income taxes (or that petitioner had remained in the State at all, for that matter). Accordingly, the State likely would have had no way of knowing which, if any, of the individuals

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those States. Under petitioner's theory, of course, a party could claim that the State's failure to find and use the most inclusive directory made the resulting notice constitutionally deficient.

it found in those records was the owner of 717 N. Bryan Street. In any event, systems of government records similar to those mentioned by petitioner are frequently unavailable, even to other government agencies, due to privacy and other concerns. Cf., *e.g.*, 26 U.S.C. 6103 (privacy of Internal Revenue Service taxpayer records and conditions under which they can be disclosed); 5 U.S.C. 552a(b)(2) (Privacy Act).[12]

3. Finally, petitioner contends (Br. 13) that "the State could have provided notice to [petitioner] by contacting the occupants of the house, either in person or by mail, or by posting a notice at the property." Petitioner points out that the house was in fact occupied by his wife, whom he asserts (Br. 14) "had a strong incentive to convey to [petitioner] any notice indicating that the property was about to be lost." Petitioner's claim, however, is based on hindsight, since the State, which had not even been informed that petitioner no longer lived at the property, certainly had no way of knowing that his wife did continue to occupy the property and had an incentive to notify petitioner. It is also belied by the facts, given that whoever occupied the house apparently declined on multiple occasions to retrieve correspondence directed to petitioner from the Commissioner of Lands. Moreover, the State's property tax records are organized by "legal description," not mailing address, and the burden of "physically locat[ing] and post[ing] thousands of tracts each year" could "have a devastating effect on tax sales and undermine the collection of delinquent real estate taxes." *Tsann*, 129 S.W.3d at 828.

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[12] Petitioner is mistaken (Br. 12) in claiming that finding him would not "have imposed an unreasonable burden" because his "correct address appeared in the State's own records." Aside from the difficulties discussed in text, it should not be assumed that, given the size of the state and federal governments, each agency would know of an individual's address merely because it is located in the files of some other agency.

This Court has found that posting notice at a property may be unlikely to apprise the owner of an upcoming proceeding, because such notices may be removed by children, vandals, or others before they are able to convey their message to the property's owner. See *Greene* v. *Lindsay*, 456 U.S. 444, 453-454 (1982). In any event, the State's method of sending the notice (twice) by certified mail, return receipt requested, provided an adequate substitute for contacting the occupants or posting a notice. As discussed, postal service regulations provide that a carrier delivering certified mail, return receipt requested, would either encounter a person at the addressee's home who could examine the letter and the identity of the sender or leave a Form 3845 at the addressee's home with information about the letter, including the identity of the sender.[13] In either event, individuals present at the property would have been informed that the Commissioner of Lands was trying to get in touch with petitioner. And, because delivery of the first letter (and, it appears, the second letter) was attempted three times, that information was likely repeatedly conveyed to those occupying the premises. Thus, the State *did* "contact[] the occupants of the house," Pet. Br. 13, by sending the notice by certified mail, return receipt requested.

4. In short, petitioner's claim (Br. 13) that various efforts to provide notice to him by other means "would have resulted in actual notice to [petitioner], as the facts of this case show,"

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[13] Petitioner is thus mistaken in contending (Br. 14) that "[n]othing in the record suggests that [his wife] had any knowledge of the contents of the letters or even who they were from." It is likely that the occupants did have knowledge of the identity of the sender of the letters, and with that knowledge they could reasonably have assumed that the subject matter was taxes. Under standard Postal Service procedures—and there is no basis for any assumption that they were not followed here—the occupants of the property would have been provided notice, either by the postal carrier directly or by reviewing the Form 3845 that was left for them on each delivery, that the Commissioner of Lands was the sender of the letter.

in the end reduces to the claim that an observer with the benefit of hindsight could easily have determined how to find petitioner and provide notice to him. The State, however, at the time that it was under the obligation to provide notice, did not have the benefit of such hindsight. Moreover, the salient question is not whether the State, if it devoted sufficient means to the matter, could have located petitioner, but whether the method used for this and thousands of other notices was reasonably calculated, *ex ante*, to provide notice. Providing further notice in this case, and in the countless other analogous cases that arise each year, would be both unduly burdensome and speculative.

Accepting petitioner's claim would also have a destabilizing effect on property rights. Under petitioner's view, a State's method of notice could regularly be challenged as inadequate whenever a doubt arose about whether it was in fact successful; whatever method the State used, it would not be difficult for an intended recipient to argue that some other method was available that would have resulted in successfully providing him notice. Especially in the context of claims to real property, the uncertainty that such a system could create would impose high costs on the government when it provided notice, would likely make the properties involved less marketable, and would impose costs as well on successor owners who had good reason to believe they had acquired good title. In administering a system such as the State's property tax system, it is essential that the State know what steps it must take to notify delinquent property owners of upcoming proceedings, and those steps must be "easily ascertainable." *Schroeder*, 371 U.S. at 212-213. Where the State has provided constitutionally adequate notice in the first instance, the fact that some doubt arises as to the success of that notice does not impose an obligation on the State to undertake a new search—or repeated new searches—of uncertain scope for a method of notice designed to reach the intended recipient.

CONCLUSION

The judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JONES *v.* FLOWERS ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 04–1477. Argued January 17, 2006—Decided April 26, 2006

Petitioner Jones continued to pay the mortgage on his Arkansas home after separating from his wife and moving elsewhere in the same city. Once the mortgage was paid off, the property taxes—which had been paid by the mortgage company—went unpaid, and the property was certified as delinquent. Respondent Commissioner of State Lands mailed Jones a certified letter at the property's address, stating that unless he redeemed the property, it would be subject to public sale in two years. Nobody was home to sign for the letter and nobody retrieved it from the post office within 15 days, so it was returned to the Commissioner, marked "unclaimed." Two years later, the Commissioner published a notice of public sale in a local newspaper. No bids were submitted, so the State negotiated a private sale to respondent Flowers. Before selling the house, the Commissioner mailed another certified letter to Jones, which was also returned unclaimed. Flowers purchased the house and had an unlawful detainer notice delivered to the property. It was served on Jones' daughter, who notified him of the sale. He filed a state-court suit against respondents, alleging that the Commissioner's failure to provide adequate notice resulted in the taking of his property without due process. Granting respondents summary judgment, the trial court concluded that Arkansas' tax sale statute, which sets out the notice procedure used here, complied with due process. The State Supreme Court affirmed.

Held:

1. When mailed notice of a tax sale is returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. Pp. 4–12.

(a) This Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent,

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see, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314, but has never addressed whether due process requires further efforts when the government becomes aware prior to the taking that its notice attempt has failed. Most Courts of Appeals and State Supreme Courts addressing this question have decided that the government must do more in such a case, and many state statutes require more than mailed notice in the first instance. Pp. 4–6.

(b) The means a State employs to provide notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 399 U. S., at 315. The adequacy of a particular form of notice is assessed by balancing the State's interest against "the individual interest sought to be protected by the Fourteenth Amendment." *Id.*, at 314. Here, the evaluation concerns the adequacy of notice prior to the State's extinguishing a property owner's interest in a home. It is unlikely that a person who actually desired to inform an owner about an impending tax sale of a house would do nothing when a certified letter addressed to the owner is returned unclaimed. The sender would ordinarily attempt to resend the letter, if that is practical, especially given that it concerns the important and irreversible prospect of losing a house. The State may have made a reasonable calculation of how to reach Jones, but it had good reason to suspect when the notice was returned that Jones was no better off than if no notice had been sent. The government must consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. See *Robinson* v. *Hanrahan*, 409 U. S. 38, 40 *(per curiam)*, and *Covey* v. *Town of Somers*, 351 U. S. 141, 146–147. It does not matter that the State in each of those cases was aware of the information *before* it calculated the best way to send notice. Knowledge that notice was ineffective was one of the "practicalities and peculiarities of the case" taken into account, *Mullane*, *supra*, at 314–315, and it should similarly be taken into account in assessing the adequacy of notice here. The Commissioner and Solicitor General correctly note the constitutionality of that a particular notice procedure is assessed *ex ante*, not *post hoc*. But if a feature of the State's procedure is that it promptly provides additional information to the government about the effectiveness of attempted notice, the *ex ante* principle is not contravened by considering what the government does with that information. None of the Commissioner's additional contentions—that notice was sent to an address that Jones provided and had a legal obligation to keep updated, that a property owner who fails to receive a property tax bill and pay taxes is on inquiry notice that his property is subject to governmental taking, and that Jones was obliged to ensure that those in whose hands he left his

Syllabus

property would alert him if it was in jeopardy—relieves the State of its constitutional obligation to provide adequate notice. Pp. 7–12.

2. Because additional reasonable steps were available to the State, given the circumstances here, the Commissioner's effort to provide notice to Jones was insufficient to satisfy due process. What is reasonable in response to new information depends on what that information reveals. The certified letter's return "unclaimed" meant either that Jones was not home when the postman called and did not retrieve the letter or that he no longer resided there. One reasonable step addressed to the former possibility would be for the State to resend the notice by regular mail, which requires no signature. Certified mail makes actual notice more likely only if someone is there to sign for the letter or tell the mail carrier that the address is incorrect. Regular mail can be left until the person returns home, and might increase the chances of actual notice. Other reasonable follow-up measures would have been to post notice on the front door or address otherwise undeliverable mail to "occupant." Either approach would increase the likelihood that any occupants would alert the owner, if only because an ownership change could affect their own occupancy. Contrary to Jones' claim, the Commissioner was not required to search the local phone book and other government records. Such an open-ended search imposes burdens on the State significantly greater than the several relatively easy options outlined here. The Commissioner's complaint about the burden of even these additional steps is belied by Arkansas' requirement that notice to homestead owners be accomplished by personal service if certified mail is returned and by the fact that the State transfers the cost of notice to the taxpayer or tax sale purchaser. The Solicitor General's additional arguments—that posted notice could be removed by children or vandals, and that the follow-up requirement will encourage States to favor modes of delivery that will not generate additional information—are rejected. This Court will not prescribe the form of service that Arkansas should adopt. Arkansas can determine how best to proceed, and the States have taken a variety of approaches. Pp. 12–17.

359 Ark. 443, ___ S. W. 3d ___, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA and KENNEDY, JJ., joined. ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1477

GARY KENT JONES, PETITIONER *v.* LINDA K. FLOWERS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

[April 26, 2006]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We granted certiorari to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property.

I

In 1967, petitioner Gary Jones purchased a house at 717 North Bryan Street in Little Rock, Arkansas. He lived in the house with his wife until they separated in 1993. Jones then moved into an apartment in Little Rock, and his wife continued to live in the North Bryan Street house. Jones paid his mortgage each month for 30 years, and the mortgage company paid Jones' property taxes. After Jones paid off his mortgage in 1997, the property taxes

went unpaid, and the property was certified as delinquent.

In April 2000, respondent Mark Wilcox, the Commissioner of State Lands (Commissioner), attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones at the North Bryan Street address. See Ark. Code Ann. §26–37–301 (1997). The packet of information stated that unless Jones redeemed the property, it would be subject to public sale two years later on April 17, 2002. See *ibid.* Nobody was home to sign for the letter, and nobody appeared at the post office to retrieve the letter within the next 15 days. The post office returned the unopened packet to the Commissioner marked "'unclaimed.'" Pet. for Cert. 3.

Two years later, and just a few weeks before the public sale, the Commissioner published a notice of public sale in the Arkansas Democrat Gazette. No bids were submitted, which permitted the State to negotiate a private sale of the property. See §26–37–202(b). Several months later, respondent Linda Flowers submitted a purchase offer. The Commissioner mailed another certified letter to Jones at the North Bryan Street address, attempting to notify him that his house would be sold to Flowers if he did not pay his taxes. Like the first letter, the second was also returned to the Commissioner marked "unclaimed." *Ibid.* Flowers purchased the house, which the parties stipulated in the trial court had a fair market value of $80,000, for $21,042.15. Record 224. Immediately after the 30-day period for postsale redemption passed, see §26–37–202(e), Flowers had an unlawful detainer notice delivered to the property. The notice was served on Jones' daughter, who contacted Jones and notified him of the tax sale. *Id.*, at 11 (Exh. B).

Jones filed a lawsuit in Arkansas state court against the Commissioner and Flowers, alleging that the Commissioner's failure to provide notice of the tax sale and of Jones' right to redeem resulted in the taking of his prop-

erty without due process. The Commissioner and Flowers moved for summary judgment on the ground that the two unclaimed letters sent by the Commissioner were a constitutionally adequate attempt at notice, and Jones filed a cross-motion for summary judgment. The trial court granted summary judgment in favor of the Commissioner and Flowers. App. to Pet. for Cert. 12a–13a. It concluded that the Arkansas tax sale statute, which set forth the notice procedure followed by the Commissioner, complied with constitutional due process requirements.

Jones appealed, and the Arkansas Supreme Court affirmed the trial court's judgment. 359 Ark. 443, ___ S. W. 3d ___ (2004). The court noted our precedent stating that due process does not require actual notice, see *Dusenbery* v. *United States*, 534 U. S. 161, 170 (2002), and it held that attempting to provide notice by certified mail satisfied due process in the circumstances presented, 359 Ark., at ___, ___ S. W. 3d, at ___.

We granted certiorari, 545 U. S. ___ (2005), to resolve a conflict among the Circuits and State Supreme Courts concerning whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered. Compare, *e.g.*, *Akey* v. *Clinton County*, 375 F. 3d 231, 236 (CA2 2004) ("In light of the notice's return, the County was required to use 'reasonably diligent efforts' to ascertain Akey's correct address"), and *Kennedy* v. *Mossafa*, 100 N. Y. 2d 1, 9, 789 N. E. 2d 607, 611 (2003) ("[W]e reject the view that the enforcing officer's obligation is always satisfied by sending the notice to the address listed in the tax roll, even where the notice is returned as undeliverable"), with *Smith* v. *Cliffs on the Bay Condominium Assn.*, 463 Mich. 420, 429, 617 N. W. 2d 536, 541 (2000) *(per curiam)* ("The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation

to see if a new address . . . could be located"). We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. Under the circumstances presented here, additional reasonable steps were available to the State. We therefore reverse the judgment of the Arkansas Supreme Court.

II

A

Due process does not require that a property owner receive actual notice before the government may take his property. *Dusenbery, supra,* at 170. Rather, we have stated that due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U. S., at 314. The Commissioner argues that once the State provided notice reasonably calculated to apprise Jones of the impending tax sale by mailing him a certified letter, due process was satisfied. The Arkansas statutory scheme is reasonably calculated to provide notice, the Commissioner continues, because it provides for notice by certified mail to an address that the property owner is responsible for keeping up to date. See Ark. Code Ann. §26–35–705 (1997). The Commissioner notes this Court's ample precedent condoning notice by mail, see, *e.g., Dusenbery, supra,* at 169; *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U. S. 478, 490 (1988); *Mennonite Bd. of Missions* v. *Adams,* 462 U. S. 791, 798 (1983); *Mullane, supra,* at 318–319, and adds that the Arkansas scheme exceeds constitutional requirements by requiring the Commissioner to use certified mail. Brief for Respondent Commissioner 14–15.

It is true that this Court has deemed notice constitu-

tionally sufficient if it was reasonably calculated to reach the intended recipient when sent. See, *e.g.*, *Dusenbery*, *supra*, at 168–169; *Mullane*, 339 U. S., at 314. In each of these cases, the government attempted to provide notice and heard nothing back indicating that anything had gone awry, and we stated that "[t]he reasonableness and hence the constitutional validity of [the] chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id.*, at 315; see also *Dusenbery*, *supra*, at 170. But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. That is a new wrinkle, and we have explained that the "notice required will vary with circumstances and conditions." *Walker* v. *City of Hutchinson*, 352 U. S. 112, 115 (1956). The question presented is whether such knowledge on the government's part is a "circumstance and condition" that varies the "notice required."

The Courts of Appeals and State Supreme Courts have addressed this question on frequent occasions, and most have decided that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold in a tax sale.[1] See, *e.g.*, *Plemons* v. *Gale*, 396 F. 3d 569, 576

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[1]Most Courts of Appeals have also concluded that the Due Process Clause of the Fifth Amendment requires the Federal Government to take further reasonable steps in the property-forfeiture context. See, *e.g.*, *United States* v. *Ritchie*, 342 F. 3d 903, 911 (CA9 2003); *Foehl* v. *United States*, 238 F. 3d 474, 480 (CA3 2001); *Small* v. *United States*, 136 F. 3d 1334, 1337–1338 (CADC 1998); *Torres* v. *$36,256.80 U. S. Currency*, 25 F. 3d 1154, 1161 (CA2 1994); *Barrera-Montenegro* v. *United States*, 74 F. 3d 657, 660 (CA5 1996); *United States* v. *Rodgers*, 108 F. 3d 1247, 1252–1253 (CA10 1997); see also *Garcia* v. *Meza*, 235 F. 3d 287, 291 (CA7 2000) (declining to adopt a *per se* rule that only examines notice at the time it is sent, but also declining to impose an affirmative duty to seek out claimants in every case where notice is returned undelivered). But see

(CA4 2005); *Akey*, 375 F. 3d, at 236; *Hamilton* v. *Renewed Hope, Inc.*, 277 Ga. 465, 468, 589 S. E. 2d 81, 85 (2003); *Kennedy*, 100 N. Y. 2d, at 9, 789 N. E. 2d, at 611; *Malone* v. *Robinson*, 614 A. 2d 33, 38 (D. C. App. 1992); *St. George Antiochian Orthodox Christian Church* v. *Aggarwal*, 326 Md. 90, 103, 603 A. 2d 484, 490 (1992); *Wells Fargo Credit Corp.* v. *Ziegler*, 780 P. 2d 703, 705 (Okla. 1989); *Rosenberg* v. *Smidt*, 727 P. 2d 778, 780–783 (Alaska 1986); *Giacobbi* v. *Hall*, 109 Idaho 293, 297, 707 P. 2d 404, 408 (1985); *Tracy* v. *County of Chester, Tax Claim Bureau*, 507 Pa. 288, 296, 489 A. 2d 1334, 1338–1339 (1985). But see *Smith*, 463 Mich., at 429, 617 N. W. 2d, at 541; *Dahn* v. *Trownsell*, 1998 SD 36, ¶23, 576 N. W. 2d 535, 541–542; *Elizondo* v. *Read*, 588 N. E. 2d 501, 504 (Ind. 1992); *Atlantic City* v. *Block C–11, Lot 11*, 74 N. J. 34, 39–40, 376 A. 2d 926, 928 (1977). Many States already require in their statutes that the government do more than simply mail notice to delinquent owners, either at the outset or as a followup measure if initial mailed notice is ineffective.[2]

Madewell v. *Downs*, 68 F. 3d 1030, 1047 (CA8 1995); *Sarit* v. *United States Drug Enforcement Admin.*, 987 F. 2d 10, 14–15 (CA1 1993).

[2]Many States require that notice be given to the occupants of the property as a matter of course. See Cal. Rev. & Tax. Code Ann. §3704.7 (West Supp. 2006); Ga. Code Ann. §48–4–45(a)(1)(B) (Supp. 2005); Ill. Comp. Stat., ch. 35, §§200/21–75(a), 200/22–10, 200/22–15 (West 2004); Me. Rev. Stat. Ann., Tit. 36, §1073 (1990); Md. Tax-Prop. Code Ann. §14–836(b)(4)(i)(2) (Lexis 2001); Mich. Comp. Laws Ann. §211.78i(3) (West 2005); Minn. Stat. §281.23(6) (2004); Mont. Code Ann. §§15–18–212(1)(a), (2)(A) (2005); N. D. Cent. Code Ann. §57–28–04(3) (Lexis 2005); Okla. Stat., Tit. 68, §3118(A) (West Supp. 2006); S. D. Codified Laws §10–25–5 (2004); Utah Code Ann. §59–2–1351(2)(a) (Lexis 2004); Wis. Stat. §75.12(1) (2003–2004); Wyo. Stat. Ann. §39–13–108(e)(v)(B) (2005). Some States require that notice be posted on the property or at the property owner's last known address either at the outset, see Del. Code Ann., Tit. 9, §§8721, 8772 (1989 and Supp. 2004); Ga. Code Ann. §48–4–78(d) (Supp. 2005); Haw. Rev. Stat. §246–56 (2003); Md. Tax-Prop. Code Ann. §14–836(b)(6) (Lexis 2001); Okla. Stat., Tit. 68, §3118(A) (West Supp. 2006), or as a followup measure when personal

In *Mullane*, we stated that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," 339 U. S., at 315, and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment," *id.*, at 314. Our leading cases on notice have evaluated the adequacy of notice given to beneficiaries of a common trust fund, *Mullane*, *supra;* a mortgagee, *Mennonite*, 462 U. S. 791; owners of seized cash and automobiles, *Dusenbery*, 534 U. S. 161; *Robinson* v. *Hanrahan*, 409 U. S. 38 (1972) *(per curiam);* creditors of an estate, *Tulsa Professional*, 485 U. S. 478; and tenants living in public housing, *Greene* v. *Lindsey*, 456 U. S. 444 (1982). In this case, we evaluate the adequacy of notice prior to the State extinguishing a property owner's interest in a home.

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent

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service cannot be accomplished or certified mail is returned, see Fla. Stat. §197.522(2)(a) (2003); Minn. Stat. §281.23(6) (2004); S. C. Code Ann. §12–51–40(c) (Supp. 2005). And a few States require a diligent inquiry to find a property owner's correct address when mailed notice is returned. See Miss. Code Ann. §27–43–3 (2002); Nev. Rev. Stat. §361.595(3)(b) (2003); Pa. Stat. Ann., Tit. 72, §5860.607a (Purdon 1990); R. I. Gen. Laws §44–9–25.1 (2005).

See also 26 U. S. C. §6335(a) (requiring the Internal Revenue Service to make a reasonable attempt to personally serve notice on a delinquent taxpayer before relying upon notice by certified mail); 28 U. S. C. §3203(g)(1)(A)(i)(IV) (requiring written notice to tenants of real property subject to sale under the Federal Debt Collection Practices Act); 12 U. S. C. §3758(2)(A)(iii) (requiring written notice to occupants before foreclosure by the Secretary of Housing and Urban Development); §3758(2)(B)(ii) (requiring that notice be posted on the property if occupants are unknown).

taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. See *Small* v. *United States*, 136 F. 3d 1334, 1337 (CADC 1998). This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." *Malone*, *supra*, at 37. Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available.

In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. In *Robinson* v. *Hanrahan*, we held that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate when the State knew that the property owner was in prison. 409 U. S., at 40. In *Covey* v. *Town of Somers*, 351 U. S. 141 (1956), we held that notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection. *Id.*, at

146–147.

The Commissioner points out that in these cases, the State was aware of such information *before* it calculated how best to provide notice. But it is difficult to explain why due process would have settled for something less if the government had learned after notice was sent, but before the taking occurred, that the property owner was in prison or was incompetent. Under *Robinson* and *Covey*, the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice. That knowledge was one of the "practicalities and peculiarities of the case," *Mullane*, *supra*, at 314–315, that the Court took into account in determining whether constitutional requirements were met. It should similarly be taken into account in assessing the adequacy of notice in this case. The dissent dismisses the State's knowledge that its notice was ineffective as "learned long after the fact," *post*, at 7, n. 5 (opinion of THOMAS, J.), but the notice letter was promptly returned to the State two to three weeks after it was sent, and the Arkansas statutory regime precludes the State from taking the property for two *years* while the property owner may exercise his right to redeem, see Ark. Code Ann. §26–37–301 (Supp. 2005).

It is certainly true, as the Commissioner and Solicitor General contend, that the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*. But if a feature of the State's chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the *ex ante* principle to consider what the government does with that information in assessing the adequacy of the chosen procedure. After all, the State knew *ex ante* that it would promptly learn whether its

effort to effect notice through certified mail had succeeded. It would not be inconsistent with the approach the Court has taken in notice cases to ask, with respect to a procedure under which telephone calls were placed to owners, what the State did when no one answered. Asking what the State does when a notice letter is returned unclaimed is not substantively different.

The Commissioner has three further arguments for why reasonable followup measures were not required in this case. First, notice was sent to an address that Jones provided and had a legal obligation to keep updated. See Ark. Code Ann. §26–35–705 (1997). Second, "after failing to receive a property tax bill and pay property taxes, a property holder is on inquiry-notice that his property is subject to governmental taking." Brief for Respondent Commissioner 18–19. Third, Jones was obliged to ensure that those in whose hands he left his property would alert him if it was in jeopardy. None of these contentions relieves the State of its constitutional obligation to provide adequate notice.

The Commissioner does not argue that Jones' failure to comply with a statutory obligation to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree. *Id.*, at 19; see also Brief for United States as *Amicus Curiae* 16, n. 5 (quoting *Mennonite*, 462 U. S., at 799 ("'[A] party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation'")). In *Robinson*, we noted that Illinois law required each vehicle owner to register his address with the secretary of state, and that the State's vehicle forfeiture scheme provided for notice by mail to the address listed in the secretary's records. See 409 U. S., at 38, n. 1 (citing Ill. Rev. Stat., ch. 95½, §3–405 (1971), and ch. 38, §36–1 (1969)). But we found that the State had not provided constitutionally sufficient notice, despite having followed its reasonably calculated scheme, because it knew

that Robinson could not be reached at his address of record. 409 U. S., at 31–32. Although Ark. Code Ann. §26–35–705 provides strong support for the Commissioner's argument that mailing a certified letter to Jones at 717 North Bryan Street was reasonably calculated to reach him, it does not alter the reasonableness of the Commissioner's position that he must do nothing more when the notice is promptly returned "unclaimed."

As for the Commissioner's inquiry notice argument, the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property. We have previously stated the opposite: An interested party's "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Mennonite, supra,* at 800. It is at least as widely known that arrestees have the right to remain silent, and that anything they say may be used against them, see *Dickerson* v. *United States,* 530 U. S. 428, 443 (2000) ("*Miranda* [v. *Arizona,* 384 U. S. 436 (1966),] has become embedded in routine police practice to the point where the warnings have become part of our national culture"), but that knowledge does not excuse a police failure to provide *Miranda* warnings. Arkansas affords even a delinquent taxpayer the right to settle accounts with the State and redeem his property, so Jones' failure to pay his taxes in a timely manner cannot by itself excuse inadequate notice.

Finally, the Commissioner reminds us of a statement from *Mullane* that the State can assume an owner leaves his property in the hands of one who will inform him if his interest is in jeopardy. 339 U. S., at 316. But in this passage, Justice Jackson writes of "libel of a ship, attachment of a chattel[,] or entry upon real estate in the name of law"—such "seiz[ures]" of property, he concluded, "may reasonably be expected to come promptly to the owner's

attention." *Ibid.* An occupant, however, is not charged with acting as the owner's agent in all respects, and it is quite a leap from Justice Jackson's examples to conclude that it is an obligation of tenancy to follow up with certified mail of unknown content addressed to the owner. In fact, the State makes it impossible for the occupant to learn why the Commissioner is writing the owner, because an occupant cannot call for a certified letter without first obtaining the owner's signature. For all the occupant knows, the Commissioner of State Lands might write to certain residents about a variety of matters he finds important, such as state parks or highway construction; it would by no means be obvious to an occupant observing a certified mail slip from the Commissioner that the owner is in danger of losing his property. In any event, there is no record evidence that notices of attempted delivery were left at 717 North Bryan Street.

Mr. Jones should have been more diligent with respect to his property, no question. People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking. U. S. Const., Amdt. 14; *Mennonite, supra*, at 799.

B

In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did—nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps. While "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt," *Greene*, 456 U. S., at 455, n. 9, if there were no reasonable addi-

tional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing.

We think there were several reasonable steps the State could have taken. What steps are reasonable in response to new information depends upon what the new information reveals. The return of the certified letter marked "unclaimed" meant either that Jones still lived at 717 North Bryan Street, but was not home when the postman called and did not retrieve the letter at the post office, or that Jones no longer resided at that address. One reasonable step primarily addressed to the former possibility would be for the State to resend the notice by regular mail, so that a signature was not required. The Commissioner says that use of certified mail makes actual notice more likely, because requiring the recipient's signature protects against misdelivery. But that is only true, of course, when someone is home to sign for the letter, or to inform the mail carrier that he has arrived at the wrong address. Otherwise, "[c]ertified mail is dispatched and handled in transit as ordinary mail," United States Postal Service, Domestic Mail Manual §503.3.2.1 (Mar. 16, 2006), and the use of certified mail might make actual notice less likely in some cases—the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time. Following up with regular mail might also increase the chances of actual notice to Jones if—as it turned out—he had moved. Even occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify Jones directly.

Other reasonable followup measures, directed at the possibility that Jones had moved as well as that he had simply not retrieved the certified letter, would have been

to post notice on the front door, or to address otherwise undeliverable mail to "occupant." Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. See n. 2, *supra*. Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. That is clear in the case of an owner who still resided at the premises. It is also true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice, and a letter addressed to them (even as "occupant") might be opened and read. In either case, there is a significant chance the occupants will alert the owner, if only because a change in ownership could well affect their own occupancy. In fact, Jones first learned of the State's effort to sell his house when he was alerted by one of the occupants—his daughter—after she was served with an unlawful detainer notice.

Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far. As the Commissioner points out, the return of Jones' mail marked "unclaimed" did not necessarily mean that 717 North Bryan Street was an incorrect address; it merely informed the Commissioner that no one appeared to sign for the mail before the designated date on which it would be returned to the sender. An open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector, see Ark. Code Ann. §26–35–705 (1997)—imposes burdens on the State significantly greater than the several relatively easy options outlined above.

The Commissioner complains about the burden of even those additional steps, but his argument is belied by Ar-

kansas' current requirement that notice to homestead owners be accomplished by personal service if certified mail is returned, §26–37–301(e) (Supp. 2005), and the fact that Arkansas transfers the cost of notice to the taxpayer or the tax sale purchaser, §26–37–104(a). The Commissioner has offered no estimate of how many notice letters are returned, and no facts to support the dissent's assertion that the Commissioner must now physically locate "tens of thousands of properties every year." *Post*, at 10. Citing our decision in *Greene* v. *Lindsey*, the Solicitor General adds that posted notice could be taken down by children or vandals. But in *Greene*, we noted that outside the specific facts of that case, posting notice on real property is "a singularly appropriate and effective way of ensuring that a person . . . is actually apprised of proceedings against him." 456 U. S., at 452–453. Successfully providing notice is often the most efficient way to collect unpaid taxes, see *Mennonite*, 462 U. S., at 800, n. 5 (more effective notice may ease burden on State if recipient arranges to pay delinquent taxes prior to tax sale); Tr. of Oral Arg. 24 (85 percent of tax delinquent properties in Arkansas are redeemed upon notice of delinquency), but rather than taking relatively easy additional steps to effect notice, the State undertook the burden and expense of purchasing a newspaper advertisement, conducting an auction, and then negotiating a private sale of the property to Flowers.

The Solicitor General argues that requiring further effort when the government learns that notice was not delivered will cause the government to favor modes of providing notice that do not generate additional information—for example, starting (and stopping) with regular mail instead of certified mail. We find this unlikely, as we have no doubt that the government repeatedly finds itself being asked to prove that notice was sent and received. Using certified mail provides the State with documenta-

tion of personal delivery and protection against false claims that notice was never received. That added security, however, comes at a price—the State also learns when notice has *not* been received. We conclude that, under the circumstances presented, the State cannot simply ignore that information in proceeding to take and sell the owner's property—any more than it could ignore the information that the owner in *Robinson* was in jail, or that the owner in *Covey* was incompetent.

Though the Commissioner argues that followup measures are not constitutionally required, he reminds us that the State did make some attempt to follow up with Jones by publishing notice in the newspaper a few weeks before the public sale. Several decades ago, this Court observed that "[c]hance alone" brings a person's attention to "an advertisement in small type inserted in the back pages of a newspaper," *Mullane*, 339 U. S., at 315, and that notice by publication is adequate only where "it is not reasonably possible or practicable to give more adequate warning," *id.*, at 317. Following up by publication was not constitutionally adequate under the circumstances presented here because, as we have explained, it was possible and practicable to give Jones more adequate warning of the impending tax sale.

The dissent forcefully articulates some basic principles about constitutionally required notice, principles from which we have no intention to depart. In particular, we disclaim any "new rule" that is "contrary to *Dusenbery* and a significant departure from *Mullane*." *Post*, at 6. In *Dusenbery*, the Government was aware that someone at the prison had signed for the prisoner's notice letter, and we determined that this attempt at notice was adequate, despite the fact that the State could have made notice more likely by requiring the prisoner to sign for the letter himself. 534 U. S., at 171. In this case, of course, the notice letter was returned to the Commissioner, informing

him that his attempt at notice had failed.

As for *Mullane*, it directs that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U. S., at 315. Mindful of the dissent's concerns, we conclude, at the end of the day, that someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done.

As noted, "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt." *Greene, supra,* at 455, n. 9. In prior cases finding notice inadequate, we have not attempted to redraft the State's notice statute. See, *e.g., Tulsa Professional*, 485 U. S., at 490–491; *Robinson*, 409 U. S., at 40; *Schroeder* v. *City of New York*, 371 U. S. 208, 213–214 (1962); *Walker*, 352 U. S., at 116; *Covey*, 351 U. S., at 146–147. The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question. See n. 2, *supra*. It suffices for present purposes that we are confident that additional reasonable steps were available for Arkansas to employ before taking Jones' property.

* * *

There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.

The Commissioner's effort to provide notice to Jones of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–1477

GARY KENT JONES, PETITIONER *v.* LINDA K. FLOWERS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

[April 26, 2006]

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

When petitioner failed to pay his property taxes for several consecutive years, respondent Commissioner of State Lands in Arkansas, using the record address that petitioner provided to the State, sent petitioner a letter by certified mail, noting his tax delinquency and explaining that his property would be subject to public sale if the delinquent taxes and penalties were not paid. After petitioner failed to respond, the State also published notice of the delinquency and public sale in an Arkansas newspaper. Soon after respondent Linda K. Flowers submitted a purchase offer to the State, it sent petitioner a second letter by certified mail explaining that the sale would proceed if the delinquent taxes and penalties were not paid.

Petitioner argues that the State violated his rights under the Due Process Clause of the Fourteenth Amendment because, in his view, the State failed to take sufficient steps to contact him before selling his property to Flowers. Petitioner contends that once the State became aware that he had not claimed the certified mail, it was constitutionally obligated to employ additional methods to locate him.

Adopting petitioner's arguments, the Court holds today that "when mailed notice of a tax sale is returned un-

claimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Ante*, at 4. The Court concludes that it was practicable for Arkansas to take additional steps here—namely, notice by regular mail, posting notice on petitioner's door, and addressing mail to "occupant." *Ante*, at 13. Because, under this Court's precedents, the State's notice methods clearly satisfy the requirements of the Due Process Clause, I respectfully dissent.

I

The Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property, without due process of law." This Court has held that a State must provide an individual with notice and opportunity to be heard before the State may deprive him of his property. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). Balancing a State's interest in efficiently managing its administrative system and an individual's interest in adequate notice, this Court has held that a State must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Id.*, at 313–314. As this Court has explained, "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*, at 315. "[H]eroic efforts," however, are not required. *Dusenbery* v. *United States*, 534 U. S. 161, 170 (2002). To the contrary, we have expressly rejected "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way [of the State]." *Mullane*, *supra*, at 313–314. Thus, "none of our cases . . . has required actual notice"; instead, "we have allowed the Government to defend the 'reasonableness and hence the constitutional validity of any chosen method . . . on the ground

that it is in itself reasonably certain to inform those affected.'" *Dusenbery, supra,* at 169–170 (quoting *Mullane, supra,* at 315).

The methods of notice employed by Arkansas were reasonably calculated to inform petitioner of proceedings affecting his property interest and thus satisfy the requirements of the Due Process Clause. The State mailed a notice by certified letter to the address provided by petitioner. The certified letter was returned to the State marked "unclaimed" after three attempts to deliver it. The State then published a notice of public sale containing redemption information in the Arkansas Democrat Gazette newspaper. After Flowers submitted a purchase offer, the State sent yet another certified letter to petitioner at his record address. That letter, too, was returned to the State marked "unclaimed" after three delivery attempts.[1]

Arkansas' attempts to contact petitioner by certified mail at his "record address," without more, satisfy due process. *Dusenbery, supra,* at 169. See also *Mullane, supra,* at 318; *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U. S. 478, 490 (1988) ("We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice"); *Mennonite Bd. of Missions* v. *Adams,* 462 U. S. 791, 792, 798 (1983) (holding that "notice *mailed* to [the affected party's] *last known available address*" is sufficient where a State seeks to sell "real property on

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[1]Though the Court posits that "there is no record evidence that notices of attempted delivery were left at 717 North Bryan Street," *ante,* at 12, the postal carrier was required to leave notice at the address at each delivery attempt indicating that delivery of certified mail had been attempted and that the mail could be retrieved at the local post office. See United States Postal Operations Manual §813.25 (July 2005), http://www.nalc.org/depart/can/pdf/manuals/pom/pome8.pdf (all Internet materials as visited Apr. 21, 2006, and available in Clerk of Court's case file) ("The carrier must leave a notice of arrival on Form 3849 if the carrier cannot deliver the certifiable article for any reason").

which payments of property taxes have been delinquent" (emphasis added)). Because the notices were sent to the address provided by petitioner himself, the State had an especially sound basis for determining that notice would reach him. Moreover, Arkansas exceeded the constitutional minimum by additionally publishing notice in a local newspaper.[2] See *Mullane*, *supra*, at 318. Due process requires nothing more—and certainly not here, where petitioner had a statutory duty to pay his taxes and to report any change of address to the state taxing authority. See Ark. Code Ann. §26–35–705 (1997).

My conclusion that Arkansas' notice methods satisfy due process is reinforced by the well-established presumption that individuals, especially those owning property, act in their own interest. Recognizing that "'[i]t is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it,'" *Mullane*, *supra*, at 316 (quoting *The Mary*, 9 Cranch 126, 144 (1815)), this Court has concluded that "[t]he ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights." *Mullane*, 339 U. S., at 316. Consistent with this observation, Arkansas was free to "indulge the assumption" that petitioner had either provided the State taxing authority with a correct and up-to-date mailing address—as required by state law—"or that he . . . left some caretaker under a duty to let him know that [his property was] being jeopardized."[3] *Ibid.*

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[2]The Court found inadequate the State's attempt at notice by publication, as if that were the State's *sole* method for effectuating notice, see *ante*, at 16. But the State plainly used it here as a *secondary* method of notice.

[3]The issue is not, as the Court maintains, whether the current occupant is "charged with acting as the owner's agent." *Ante*, at 12. Rather, the issue is whether petitioner discharged his *own* duty to guard his interests.

The Court does not conclude that certified mail is inherently insufficient as a means of notice, but rather that "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." *Ante*, at 9. I disagree.

First, whether a method of notice is reasonably calculated to notify the interested party is determined *ex ante*, *i.e.*, from the viewpoint of the government agency at the time its notice is sent. This follows from *Mullane*, where this Court rested its analysis on the information the sender had "at hand" when its notice was sent. 339 U. S., at 318. Relatedly, we have refused to evaluate the reasonableness of a particular method of notice by comparing it to alternative methods that are identified after the fact. See *Dusenbery*, 534 U. S., at 171–172. Today the Court appears to abandon both of these practices. Its rejection of Arkansas' selected method of notice—a method this Court has repeatedly concluded is constitutionally sufficient—is based upon information that was unavailable when notice was sent. Indeed, the Court's proposed notice methods—regular mail, posting and addressing mail to "occupant," *ante*, at 12–14—are entirely the product of *post hoc* considerations, including the discovery that members of petitioner's family continued to live in the house. Similarly, the Court's observation that "[t]he Commissioner['s] complain[t] about the burden of . . . additional steps . . . is belied by Arkansas' current requirement that notice to homestead-owners be accomplished by personal service if certified mail is returned," *ante*, at 14–15, is contrary to *Dusenbery*'s "conclusion that the Government ought not be penalized and told to 'try harder' . . . simply because [it] has since upgraded its policies," 534 U. S., at 172 (citation omitted).

Second, implicit in our holding that due process does not require "actual notice," see *id.*, at 169–170, is that when

the "government becomes aware . . . that its attempt at notice has failed," *ante*, at 5, it is not required to take additional steps to ensure that notice has been received. Petitioner's challenge to Arkansas' notice methods, and the Court's acceptance of it, is little more than a thinly veiled attack on *Dusenbery*. Under the majority's logic, each time a doubt is raised with respect to whether notice has reached an interested party, the State will have to consider additional means better calculated to achieve notice. Because this rule turns on speculative, newly acquired information, it has no natural end point, and, in effect, requires the States to achieve something close to actual notice. The majority's new rule is contrary to *Dusenbery* and a significant departure from *Mullane*.

The only circumstances in which this Court has found notice by mail and publication inadequate under the Due Process Clause involve situations where the state or local government knew at the outset that its notice efforts were destined to fail and knew how to rectify the problem prior to sending notice. See *Robinson* v. *Hanrahan*, 409 U. S. 38, 39 (1972) *(per curiam)* (intended recipient known to be in jail); *Covey* v. *Town of Somers*, 351 U. S. 141, 145 (1956) (intended recipient known to be incompetent and without a guardian).

In *Robinson*, the State, having arrested petitioner and detained him in county jail, immediately instituted forfeiture proceedings against his automobile and mailed notice of those proceedings to his residential address. 409 U. S., at 38. Robinson, who was incarcerated in the county jail during the entirety of the forfeiture proceedings, did not receive notice of the proceedings until after he was released and the forfeiture order had been entered. *Id.*, at 38–39. Because the State knew beforehand that Robinson was not at, and had no access to, the address to which it sent the notice, this Court held that the State's efforts were not "reasonably calculated" to notify him of the pend-

ing proceedings. *Id.*, at 40. Similarly, in *Covey*, the Court concluded that the methods of notice used by the town—mailing, posting, and publishing—were not reasonably calculated to inform Covey of proceedings adverse to her property interests because local officials knew prior to sending notice that she was "without mental capacity to handle her affairs" and unable to comprehend the meaning of the notices. 351 U. S., at 144, 146.

By contrast, Arkansas did not know at the time it sent notice to petitioner that its method would fail; and Arkansas did not know that petitioner no longer lived at the record address simply because letters were returned "unclaimed." Pet. for Cert. 3. "[U]nclaimed" does not necessarily mean that an address is no longer correct; it may indicate that an intended recipient has simply failed or refused to claim mail. See United States Postal Service, Domestic Mail Manual (DMM), §507, Exh. 1.4.1, http://pe.usps.gov/text/dmm300/507.htm.[4] Given that the State had been using the address provided by petitioner and that petitioner had a legal duty to maintain a current mailing address with the state taxing authority, return of the mail as "unclaimed" did not arm Arkansas with the type of specific knowledge that the governments had at hand in *Robinson* and *Covey*. Cf. *ante*, at 13. The State cannot be charged to correct a problem of petitioner's own creation and of which it was not aware.[5]

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[4]The Postal Service uses "Moved, Left No Address" to indicate that the "[A]ddressee moved and filed no change-of-address order," and "Not Deliverable as Addressed—Unable to Forward" to indicate that the mail is "undeliverable at address given; no change-of-address order on file; forwarding order expired." DMM §507, Exh. 1.4.1.

[5]The Court's "storm drain" hypothetical, *ante*, at 7–8, presents the harder question of when notice is sent—at the precise moment the Commissioner places the mail in the postal carrier's hand or the split second later when he observes the departing carrier drop the mail down the storm drain. That more difficult question is not before us in this case because Arkansas learned long after the fact that its attempts had been unsuccessful.

Even if the State had divined that petitioner was no longer at the record address, its publication of notice in a local newspaper would have sufficed because *Mullane* authorizes the use of publication when the record address is unknown. See 339 U. S., at 316 ("[P]ublication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning").

II

The Court's proposed methods, aside from being constitutionally unnecessary, are also burdensome, impractical, and no more likely to effect notice than the methods actually employed by the State.

In Arkansas, approximately 18,000 parcels of delinquent real estate are certified annually. *Tsann Kuen Enterprises Co.* v. *Campbell*, 335 Ark. 110, 119–120, 129 S. W. 3d 822, 828 (2003). Under the Court's rule, the State will bear the burden of locating thousands of delinquent property owners. These administrative burdens are not compelled by the Due Process Clause. See *Mullane, supra*, at 313–314; *Tulsa Professional Collection Services, Inc.*, 485 U. S., at 489–490 (stating that constitutionally sufficient notice "need not be inefficient or burdensome"). Here, Arkansas has determined that its law requiring property owners to maintain a current address with the state taxing authority, in conjunction with its authorization to send property notices to the record address, is an efficient and fair way to administer its tax collection system. The Court's decision today forecloses such a reasonable system and burdens the State with inefficiencies caused by delinquent taxpayers.

Moreover, the Court's proposed methods are no more reasonably calculated to achieve notice than the methods employed by the State here. Regular mail is hardly foolproof; indeed, it is arguably less effective than certified mail. Certified mail is tracked, delivery attempts are

recorded, actual delivery is logged, and notices are posted to alert someone at the residence that certified mail is being held at a local post office. By creating a record, these features give parties grounds for defending or challenging notice. By contrast, regular mail is untraceable; there is no record of either delivery or receipt. Had the State used regular mail, petitioner would presumably argue that it should have sent notice by certified mail because it creates a paper trail.[6]

The Court itself recognizes the deficiencies of its proposed methods. It acknowledges that "[f]ollowing up with regular mail *might* . . . increase the chances of actual notice"; "occupants who ignored certified mail notice slips . . . *might* scrawl the owner's new address on the notice packet," *ante*, at 12; and "a letter addressed to [occupant] *might* be opened and read," *ante*, at 14 (emphasis added). Nevertheless, the Court justifies its redrafting of Arkansas' notice statute on the ground that "[its] approach[es] would increase the likelihood that the owner would be notified that he was about to lose his property . . . ." *Ibid.* That, however, is not the test; indeed, we rejected such reasoning in *Dusenbery*. See 534 U. S., at 171 (rejecting the argument that "the FBI's notice was constitutionally flawed

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[6] Interestingly, the Court stops short of saddling the State with the other steps that petitioner argues a State should take any time the interested party fails to claim letters mailed to his record address, see *ante*, at 14, namely searching state tax records, the phone-book, the Internet, department of motor vehicle records, or voting rolls, contacting his employer, or employing debt collectors. Here, the Court reasons that because of the context—the fact that the letter was returned merely "unclaimed" and petitioner had a duty to maintain a current address—the State is not required to go as far as petitioner urges. *Ibid.* Though the methods proposed by petitioner are severely flawed (for instance, the commonality of his surname "Jones" calls into question the fruitfulness of Internet and phone-book searches), there is no principled basis for the Court's conclusion that petitioner's other proposed methods would "impos[e] burdens on the State significantly greater than the several relatively easy options outlined [by the Court]." *Ibid.*

because it was 'substantially less likely to bring home notice' than a feasible substitute" (citations omitted)).

The Court's suggestion that Arkansas post notice is similarly unavailing. The State's records are organized by legal description, not address, which makes the prospect of physically locating tens of thousands of properties every year, and posting notice on each, impractical. See *Tsann Kuen Enterprises Co., supra,* at 119–120, 129 S. W. 3d, at 828. Also, this Court has previously concluded that posting is an inherently unreliable method of notice. See *Greene* v. *Lindsey*, 456 U. S. 444, 453–454 (1982).

Similarly, addressing the mail to "occupant," see *ante,* at 13, is no more reasonably calculated to reach petitioner. It is sheer speculation to assume, as the Court does, that although "[o]ccupants . . . might disregard a certified mail slip . . . , a letter addressed to them (even as 'occupant') might be opened and read." *Ante,* at 14. It is at least as likely that an occupant who receives generically addressed mail will discard it as junk mail.

III

If "title to property should not depend on [factual] vagaries," *Dusenberry, supra,* at 171, then certainly it cannot turn on "wrinkle[s]," *ante,* at 5, caused by a property owner's own failure to be a prudent ward of his interests. The meaning of the Constitution should not turn on the antics of tax evaders and scofflaws. Nor is the self-created conundrum in which petitioner finds himself a legitimate ground for imposing additional constitutional obligations on the State. The State's attempts to notify petitioner by certified mail at the address that he provided and, additionally, by publishing notice in a local newspaper satisfy due process. Accordingly, I would affirm the judgment of the Arkansas Supreme Court.